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EVAN M. HINKSON, Administrator
of the Estate of Charlotte
E. Dorn,

Appellant,

v.

PAUL H. DAVIS, A. W. WAKELEY,
I. C. ELSTON, JR., GEORGE W.
HALL, H. I. MARKHAM, RALPH W.
DAVIS, T. E. MURCHISON, WALTER
M. GIBLIN, H. GREENE, LUTHER
DEARBORN, LYMAN BARR, and
FRANKLIN B. EVANS, Co-partners,
doing business as PAUL H. DAVIS
& CO.,

Appellees.

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

313 I.A. 142

MR. PRESIDING JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

July 24, 1931 Charlotte E. Dorn brought an action against defendants, stock brokers, to recover the market value of 352 1/2 shares of Borg-Warner stock and a credit balance of \$1,472.58 which appeared in an account carried by defendants in her name.

She died testate April 23, 1933, and Florence Hoover Wasson Hinkson was appointed executrix and subsequently she was substituted as plaintiff; later a motion was made in this court, and allowed, for leave to substitute Evan M. Hinkson, administrator of the estate of Charlotte E. Dorn, in place of the executrix, who had died. The case was tried without a jury and the court found the issues in favor of defendants, and plaintiff appeals.

Plaintiff argues that the account with the defendants in the name of Charlotte E. Dorn was in fact her account and she was entitled to recover the cash balance and the market value of the Borg-Warner stock which was in the account. Defendants say they never had any contractual relations with Charlotte E. Dorn; that the account on their books in her name was in fact the account of her husband, Dr. Gay Dorn, who requested that this account be opened to enable him to make additional subscrip-

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Jan 11 1910

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31011-004

July 24, 1961 Charlotte, North Carolina

...to recover the market value of the 1/2

Account in account carried by [redacted] in her name

11-10-41

...and the ...

... for leave to substitute Evan S. ...

who had died. The case was tried without a jury, and the defendant was found guilty of murder in the first degree. The court sentenced him to the electric chair. The execution was carried out on the morning of the 10th of the month.

found the issues in favor of defendant, and in 1914

name of Charlotte E. Joiner in that her husband was the

[illegible]

SECRET

and the account on their books in our name and in 1932

Count of the number of persons in the household who are employed full time.

tions to stocks underwritten by the defendants. Hence, it is said, defendants are not liable.

March 15, 1924, Dr. Dorn opened an account with the defendants which was an active one, although there was a very large debit balance in this account at the time of his death on March 22, 1930. Dudley E. Simpson, defendants' customers' man, testified that defendants were underwriting Universal Theatre stock and the issue was being oversubscribed, and defendants adopted a house rule limiting the number of shares which any one customer could buy to 50 shares. Simpson testified that Dr. Dorn wanted to obtain 100 shares of this stock, but it was explained to him that 50 shares was all that could be sold to any one account; it was suggested that if Dr. Dorn would open an account in another name he could obtain 50 shares in the name of this other account; Dorn then told Simpson to open this other account in the name of his wife, Charlotte Dorn, and purchase an additional 50 shares of Universal stock in the name of that account, which was done. At the time this account was opened Mrs. Dorn was not present and was not consulted. No one connected with defendants had ever seen her, and from the time this account was opened on November 1, 1924, until Dr. Dorn's death on March 22, 1930, she never communicated with the defendants.

Plaintiff argues that the monthly statements of this account, mailed to Charlotte Dorn, is evidence that the account was hers. The evidence, however, shows that the partners of defendant were the only ones that knew the account was not that of Charlotte E. Dorn, and that the bookkeeping department sent out these monthly notices as a matter of routine.

Arthur G. Lilly, the office manager of defendants, wishing to make sure that Dr. Dorn understood he was the principal in the Charlotte E. Dorn account, had a conversation with him,

... to whom information is being furnished, it is
... defendant's own property.

... 1, 1952, ...

... which was an active one, although there was a very

... in the account in the name of ...

... 1, 1952, ...

... testified that defendant was under ...

... and the ...

... the number of ...

... one customer could pay to ...

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... account; it was ...

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... account in the name of ...

... additional ...

... which was ...

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... which defendant had ever seen ...

... which was not ...

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... which was not ...

... which was not ...

calling his attention to the fact that the Charlotte account showed a debit balance of \$1,550, and that money should be deposited either to pay for the stock or as a margin, and that defendants should have a customer's agreement from Mrs. Dorn and a check to represent the margin. Thereupon Dr. Dorn told Lilly that the account was not the property of Mrs. Dorn but that it was his own account, and he repeated to Lilly that the Mrs. Dorn account was opened so as to allow him to purchase an additional 50 shares of the Universal stock. Lilly had already authorized Simpson to open this account for this purpose.

November 13, 1924 shows a credit on the Charlotte E. Dorn account of \$387.50, and a similar credit is in the account carried in the name of Dr. Dorn. This is explained by the fact that on that date Dorn paid to the defendants his personal check for \$775, which represented 25 per cent of the purchase price, which was the required margin on 100 shares of Universal stock, and this check was credited, half to each account. Subsequently new issues of stock were underwritten by defendants, and as to each of these, defendants' house rule limited the amount of stock which could be purchased for any one account. Dorn subscribed for these new issues and divided them between his own account and the Charlotte Dorn account.

August 4, 1927, 100 shares of Marvel Carburetor stock were purchased on the Chicago Stock Exchange and charged to the account of Charlotte E. Dorn. Dr. Dorn's account shows that on May 17, 1927 he had purchased 200 shares of this stock. In these purchases there was no house rule limiting the amount that any subscriber could purchase. Subsequently the Marvel Carburetor Company merged with the Borg-Warner Company and the stock was called Borg-Warner stock. These corporations issued certain stock dividends which were received in odd quantities, and small

calling his attention to the fact that the Chicago account showed a debit balance of \$1,800, and that money should be deposited either to pay for the stock or as a margin, and that defendant should have a statement from Mr. Horn and a check to represent the margin. Defendant on that day fully told the account was not the property of him, Horn but that it was his own account, and he requested to fully tell that the account was opened so as to allow him to purchase an additional 50 shares of the Universal stock. Lilly had already authorized Simpson to open this account for this purpose.

November 13, 1934 showed a credit on the Chicago account of \$27.50, and a similar credit is in the account carried in the name of Dr. Horn. This is explained by the fact that on that date Horn paid to the defendant his personal check for \$75, which represented 100 shares of the Universal stock, which was the regular price in 100 shares of Universal stock, and this check was credited, half to each account. Subsequently new issues of stock were underwritten by defendant, and as to each of these, defendant's name was listed as owner of 50 shares which could be purchased for his own account. Horn explained for these new issues and listed them between his own account and the Chicago Horn account.

August 4, 1935, 100 shares of Universal Corporation stock were purchased on the Chicago stock Exchange and charged to the account of Dr. Horn. Dr. Horn's account shows that on May 13, 1935 he had purchased 200 shares of this stock. In these purchases there was no change in the listing of the account and the defendant could purchase. Subsequently the Universal Corporation company merged with the Fort-Warner company and the stock was called Fort-Warner stock. These corporations were listed in stock dividends which were received in full quantities, and were

purchases were made. As the result of these the 100 shares of Marvel Carburetor had increased until, at the time of Dr. Dorn's death, the account in the name of Charlotte Dorn had 352 1/2 shares of Borg-Warner stock. These are the shares which are, in part, the subject matter of this litigation.

The accounts show further transactions in which Dr. Dorn made various payments to the defendants, which amounts were credited, half to the Charlotte Dorn account and the other half to the Dr. Dorn account. Various other transactions appeared, but they show that each time there was a purchase in the Charlotte Dorn account there was or had been a purchase of similar shares in the Dr. Dorn account, although Dr. Dorn's account shows that he made many purchases of various stocks carried in his own account and not in the account of Charlotte Dorn. September 30, 1929, the debit balance in the Dr. Dorn account was \$127,173.20, and the debit balance in the Charlotte Dorn account was \$15,583.21.

Between the years 1924 and 1929 the values of stocks increased by large amounts and defendants were apparently of the opinion that so long as the securities retained in the two Dorn accounts were considerably more than the amount of the combined debit balance, defendants were amply protected. However, in the latter part of October, 1929, the market crash wiped out Dr. Dorn's equity, although the Charlotte Dorn account showed ample equity, - but considered together they showed a debit balance.

Dr. Dorn was called to deposit margins but was unable to respond, and defendants started to sell securities in both accounts to reduce the combined debit balance. All the salable securities in both accounts were sold in November, except 500 shares of Bendix Aviation and 903 1/2 shares of Borg-Warner stock which stood in the Dr. Dorn account, and 352 1/2 shares of Borg-Warner which stood in the Charlotte Dorn account. This liquidation

Dr. Dorn was not made. As the result of these two accounts of
Marvel Corporation had increased until, at the time of Dr. Dorn's
death, the account in the name of Dr. Dorn had reached
amount of four-hundred thousand. These are the amounts which are
in part, the subject matter of this litigation.

The accounts show further transactions in which Dr.
Dorn made various payments to the corporation, which accounts were
credited, all to the corporation with amount and the date of
to the Dr. Dorn account. Various other transactions were
but they show that each time there was a purchase in the cor-
porate bank account there was or had been a purchase of stock
shares in the Dr. Dorn account, although Dr. Dorn's statement shows
that he made only purchases of various stocks in his
own account and not in the account of Marvel Corporation. Therefore
\$50,000, the debit balance in the Dr. Dorn account was \$157,172.50,
and the debit balance in the Charlotte Dorn account was \$15,757.51.

Between the years 1934 and 1935 the value of stock
increased by large amounts and dividends were accordingly of the
opinion that so long as the securities remained in the two Dorn
accounts were considerably more than the amount of the combined
debit balance, dividends were duly protected. However, in the
latter part of October, 1935, the dividend check was not
Dorn's equity, although the Charlotte Dorn account showed a
equity, - but considered together they showed a debit balance.
Dr. Dorn was called to deposit margin but was unable
to comply, and dividends started to sell securities in both
accounts to reduce the combined debit balance. All the debits
resulting in both accounts were sold in January, except \$200
amount of bonds, Aviation and DOW 1/4 shares of common stock
which were in the Dr. Dorn account, and DOW 1/4 shares of com-
mon stock which were in the Charlotte Dorn account. This litigation

reduced the debit balance in the Dr. Dorn account to something over \$93,000, and in the Charlotte Dorn account to \$740.68. The accounts thus stood until after Dr. Dorn's death. In December, 1929, there was a deficiency in the combined two accounts of approximately \$27,000. Dr. Dorn was asked to give defendants his note representing this deficiency, which he did.

It is in evidence that frequently customers of brokers purchase in numerous accounts, sometimes in fictitious names, and often in the name of another living person. After Dr. Dorn's death, March 22, 1930, Charlotte Dorn's attorney wrote to defendants notifying them of the death of Dr. Dorn and requesting defendants to note the fact of his death upon their records and to "conduct no further trades of any kind in his account or in any account that he may have carried in some other name." Defendants argue from this letter that both he and Charlotte Dorn understood that Dr. Dorn's two accounts with defendants were the accounts of the doctor, although one was carried in the name of Charlotte Dorn.

As the market still declined, all of the securities in both accounts were sold, leaving a combined debit balance in the two accounts of \$53,407.67, which with interest made the amount of the claim against Dr. Dorn's estate of over \$60,000. This claim was filed in the Probate court of Cook county. Charlotte first objected to the allowance of the claim because defendants had deducted from the amount of the debit balance shown in the Dr. Dorn account the balance which appeared in the Charlotte Dorn account, but finally she allowed the claim without contest, stipulating that the allowance of the full amount of the claim should be without prejudice to the rights of either of the parties in the cause now pending in the Circuit court of Cook county, -

reduced the debit balance in the Dr. Dorn account to something over \$25,000, and in the Charlotte Dorn account to \$25,000. The account thus stood until after Dr. Dorn's death. In 1925, there was a delivery in the combined two accounts of approximately \$27,000. Dr. Dorn was asked to give defendant his note representing this delivery, which he did.

It is in evidence that frequently purchases in numerous accounts, sometimes in fictitious names, and often in the name of another living person, after Dr. Dorn's death, March 22, 1920, Charlotte Dorn's attorney wrote to defendant notifying them of the death of Dr. Dorn and requesting defendant to note the fact of his death upon their records and to "connect as further traces of any kind in his account or in any account that he may have carried in some other name." Defendant argues from this letter that both he and Charlotte Dorn were stood that Dr. Dorn's two accounts with defendant were the accounts of the doctor, although one was carried in the name of Charlotte Dorn.

In the market still declining, all of the securities in both accounts were sold, leaving a combined debit balance in the two accounts of \$27,407.87, which with interest made the amount of the claim against Dr. Dorn's estate of over \$30,000. This claim was filed in the Probate court of Cook County, Charlotte first objected to the allowance of the claim because defendant had deducted from the amount of the debit balance shown in the Dr. Dorn account the balance which appeared in the Charlotte Dorn account, but finally she allowed the claim without contest, stipulating that the allowance of the full amount of the claim should be without prejudice to the right of either of the parties in the case now pending in the Circuit court of Cook County.

referring to the instant case.

There is no claim that Dr. Dorn gave or assigned to her any part of the Charlotte Dorn account. The trial court could properly believe the explanation as to the opening of the Charlotte Dorn account in addition to his own: that is, to enable Dr. Dorn to purchase more stock than permitted by defendants' house rules.

Although counsel for plaintiff objected, the statements of Dr. Dorn to defendants at the time of opening the Charlotte Dorn account were properly admitted in evidence. As counsel for defendants say, they are not attempting to hold Charlotte Dorn liable to them based upon statements made by Dr. Dorn as her alleged agent. It was never represented by Dorn that he was acting as agent for Charlotte. No legal reason is presented why Dr. Dorn could not carry as many accounts with the defendants as they would permit, and he was within his rights when he chose to use the name of his wife Charlotte when he opened his new account in that name. No contractual relations were thus established between Charlotte Dorn and the defendants.

Complaint is made of the exclusion by the court of certain written records alleged to be made by the deceased Charlotte and her deceased husband. These consist of certificates for shares of North American Car "A" stock and alleged copies of deposit slips purporting to indicate deposits by Charlotte Dorn in the bank, and purported duplicates of the income tax returns of Charlotte Dorn for the years 1924 to 1928, inclusive. The copies of the deposit slips offered in evidence were not in the handwriting of Charlotte but were in the handwriting of Dr. Dorn. There is no showing when they were made or that they were true and correct copies. The originals were not produced or accounted for. It is argued that these copies of deposit slips

referring to the instant case.

There is no claim that Dr. Dorn was assigned to any part of the Charlotte Bank account. The fact that Dr. Dorn properly believe the explanation as to the opening of the Charlotte Bank account in addition to the fact that it is possible Dr. Dorn to purchase more stock than permitted by the bank's house rules.

Although counsel for plaintiff objected, the testimony of Dr. Dorn to defendant at the time of opening the Charlotte Bank account were properly admitted in evidence. As counsel for defendant say, they are not attempting to hold Charlotte Bank liable to them based upon statements made by Dr. Dorn as an alleged agent. It was never represented by Dr. Dorn that he was acting as agent for Charlotte. No legal reason is presented why Dr. Dorn could not carry on any accounts with the defendant as they would permit, and he was within his rights when he chose to use the name of his wife Charlotte when he opened the account in that name. No contractual relation was the established between Charlotte Dorn and the defendant.

Complaint is made of the explanation by the bank of certain written records alleged to be made by the bank and Charlotte and her deceased husband. These consist of a list of the names of North American Car Co. stock and other copies of deposit slips purporting to indicate deposits by Charlotte Dorn in the bank, and purported duplicates of the income tax returns of Charlotte Dorn for the years 1924 to 1926, inclusive. The copies of the bank's slips offered in evidence were not in the handwriting of Charlotte but were in the handwriting of Dr. Dorn. There is no showing when they were made or that they were true and correct copies. The originals were not produced or accounted for. It is argued that these copies of deposit slips

tend to prove that Charlotte Dorn owned some North American Car stock, but as the deposits were made by Dr. Dorn, who could deposit into the account of his wife any check or money, regardless of from what source it came, they do not prove that Charlotte owned the North American Car stock. The same objections might be made to the duplicates of the income tax returns. It is not shown that they were true and correct copies, they were not in Charlotte Dorn's handwriting, they are not signed by anybody and it is not shown when they were prepared. No photostatic copies nor originals were offered. Moreover, it appears that plaintiff relies, not upon the income tax returns but upon some pencil memorandums in the handwriting of Dr. Dorn which were pinned to the duplicate tax returns. It is pointed out that these memorandums make it quite apparent that the purported income tax returns of Charlotte Dorn did not include any of the dividends credited by defendants in the account carried in her name, nor any profits from the sale of securities in the account. Defendants' brief details a considerable number of such items showing dividends and profits from stock, none of which are included in the income tax returns of Charlotte Dorn.

Plaintiff argues that the fact that defendants sent monthly statements to Charlotte Dorn, with requests made upon her to sign customers' cards, substantiated the claim that the account was hers. As we have seen, defendants' bookkeeping department did not know who was the actual owner of the Charlotte Dorn account, and hence monthly statements were automatically mailed to the persons in whose name the account stood upon the books. As evidence that mailing of these statements was without significance is the fact that these monthly statements addressed to Charlotte Dorn continued to be mailed to her 5 1/2 years after the commencement of this suit. Moreover, three times in each

tend to prove that Charlotte Horn owned and sold certain shares of stock, but as the deposits were made by Dr. Horn, and could deposit into the account of his wife any amount of money, without fear of their source it being known, they do not prove that Charlotte owned the North American Gas stock. The same objection might be made to the duplicates of the income tax returns, it is not known that they were true and correct copies, they were not in Charlotte Horn's handwriting, they are not signed by anybody and it is not shown when they were prepared. No photostatic copies nor originals were offered. Moreover, it appears that plaintiff relies, not upon the income tax returns but upon some pencil memoranda in the handwriting of Dr. Horn which were pinned to the Charlotte tax returns. It is pointed out that these memoranda make it quite apparent that the plaintiff income tax returns of Charlotte Horn did not include any of the dividends credited by defendant in the account credited in her name, nor any profits from the sale of securities in the account. Defendant's brief states a considerable number of such items showing dividends and profits from stock, none of which are included in the income tax returns of Charlotte Horn.

Plaintiff argues that the fact that defendant sent monthly statements to Charlotte Horn, with payments made upon her to him quarterly, and, substantially, the same that the account was kept. As we have seen, defendant's bookkeeping department did not know who was the actual owner of the Charlotte Horn account, and hence monthly statements were sent to the person in whose name the account stood upon the books. As witness the mailing of these statements without significance is the fact that these monthly statements addressed to Charlotte Horn continued to be mailed as late as 1935 years after the commencement of this suit. Moreover, these items in many

year of the existence of the Charlotte Dorn account, defendants' bookkeeping department sent to her a statement of the balance shown in this account, with the request that this be confirmed by her "by your signature advising whether correct or incorrect." There was also enclosed a form which she was to sign if the statement of the account was correct. It is very significant that from 1924 to 1929, inclusive, although she was asked to sign 18 such statements, she signed none. When Simpson, a customers' man, pursuant to a request from the bookkeeping department, called on Charlotte Dorn and attempted to obtain a customer's agreement from her so that their records might be completed, she refused to sign the card, saying she saw no reason in the world why she should sign it.

There is no support for plaintiff's claim that if defendants suffered a loss in Dr. Dorn's account it was due entirely to their own negligence. The sudden market crash of October, 1929, was the cause of the loss, and this cannot be ascribed to defendants' negligence.

Plaintiff says that defendants are liable for money had and received to the extent of the value of North American Car stock delivered to them for the sole purpose of reissue of new shares in her name in the reorganization of this company. In September, 1924, before the opening of the account in the name of Charlotte Dorn, Dr. Dorn purchased through defendants, on margin, 600 shares of North American Car stock, which was fully paid for by Dr. Dorn by his personal checks during September and the first part of October. Dorn instructed defendants to transfer 150 shares of this stock into the name of Charlotte Dorn, and the certificates in his name and her name were delivered to him. Subsequently, in 1926, the North American Car Company called in all its outstanding shares, to be exchanged for new stock in the

year of the existence of the United States, and the
bookkeeping department went to her a statement of the balance
shown in the account, with the present and future balance
by her "by your statement" which was not correct.
There was also enclosed a letter which was not in the state-
ment of the account was correct. It is very interesting to
know from 1890 to 1895, inclusive, although the balance is not
each statement, and the name, John Smith, a customer,
man, pursuant to a request from the bookkeeping department, called
on Charles Brown and attempted to obtain a statement
from him that their records might be corrected, and returned
to him the card, saying she was no person in the office and
should sign it.

There is no record for Charles Brown's name in the
and further a letter in D. Brown's account it was not
to him on negligence. The letter is not correct.
1890, and the name of the letter, and this letter is
delivered to the letter.

It is not correct that the letter is not correct
and received to the extent of the value of the letter
stock delivered to him for the value of the letter of the
which is not correct in the statement of the letter.
September, 1890, before the opening of the account in the
of Charles Brown, D. Brown and Charles Brown, and
Charles, 600 shares of stock in the letter, which was
paid for by D. Brown for his personal credit, and the
the first part of October, 1890, and the name of Charles
100 shares of the stock into the name of Charles Brown, and the
certificates in his name and the name were delivered to him.
consequently, in 1890, the letter was delivered to him
all the outstanding shares, to be delivered to the letter.

company. Dorn delayed in signing the certificates, and Simpson, customers' man for defendants, called upon him and insisted he should endorse the certificates as the time for effecting the transfer had almost expired. Dorn brought the certificates of stock into the room and in Simpson's presence asked his wife to endorse the certificate which stood in her name. She inquired why she should do this, and the doctor explained that as the certificate stood in her name her endorsement was necessary, and he repeated to her the condition of the company incorporating. Simpson testified that she was unwilling to sign the stock certificate; that "she said it was not hers and she couldn't see reason why she should do it, and she did not want to sign anything she did not understand." She finally said that if Dr. Dorn wanted her to sign it she would do so. The certificate was brought back to defendants' office by Dr. Dorn and was credited to Charlotte Dorn's account. It was thereafter exchanged for North American Car stock, which was thereafter sold upon orders of Dr. Dorn.

In plaintiff's complaint there is no reference to the 150 shares of North American Car stock. It was not contended upon the trial that the stock had been obtained by Dorn or defendants improperly or that the proceeds of the sale were improperly credited. One cannot try a case on one theory in the trial court and on another in the court of review. McArthur Bros. Co. v. Whitney, 202 Ill. 527.

There are many cases holding that the fact an account is carried in the name of a certain person does not of itself establish a contractual relationship between the parties. In Telford V. Patton, 144 Ill. 611, 627, the court took notice of the well known practice of persons depositing money in banks to

company. Born refused to sign the certificate, and instead
created one for himself, called upon him and insisted he
should sign the certificate as the firm for which he
transferred had almost expired. Born thought the certificate of
stock into the room and in response asked him why he
endorsed the certificate which stood in her name. She explained
why she should do this, and the doctor explained that in the
certificate stood in her name her endorsement was necessary,
and he repeated to her the condition of the company's incorporation.
Stinson verified that she was willing to sign the stock cer-
tificate; that she said it was not hers and she couldn't see
reason why she should do it, and she did not want to sign any-
thing she did not understand. She finally said that if Dr. Born
wanted her to sign it she would do so. The certificate was
promptly back to defendant's office by Dr. Born and was
to Charlotte's name's account. It was the latter exchanged for
North American Car stock, which was thereafter sold upon orders
of Dr. Born.

In plaintiff's complaint there is no reference to the
150 shares of North American Car stock. It was not mentioned
upon the trial that the stock had been obtained by Born or defen-
dant improperly or that the proceeds of the sale were improperly
credited. One cannot try a case on one theory in the trial court
and on another in the court of review. McIntosh v. McIntosh,
101 Ill. 537.

There are many cases holding that the fact a person
is carried in the name of a certain person does not of itself
establish a contractual relationship between the parties. In
Taylor v. Taylor, 104 Ill. 537, the court said where the
the well known practice of persons borrowing money in their

the credit of real or fictitious persons, with no intention of divesting themselves of ownership.

The points presented to the trial court were questions of fact. Under such circumstances it has been held that the trial court has the same opportunity as a jury to pass upon the facts, and its findings will not be disturbed unless clearly and manifestly against the weight of the evidence. City of Quincy v. Kemper, 304 Ill. 303; Marble v. Marble, 304 Ill. 229. The evidence that the account in Charlotte Dorn's name was in fact her account was not convincing, while the evidence offered by the defendants that the account belonged to Dr. Dorn is uncontradicted.

Under the circumstances the judgment should be affirmed.

AFFIRMED.

Matchett, and O'Connor, J. concur.

the credit of real or fictitious persons, and no intention of
divesting themselves of ownership.

The points presented to the trial court were questions

of fact. Under such circumstances it was held that the
trial court has the same opportunity as a jury to find upon the
facts, and its findings will not be disturbed unless clearly and
manifestly against the weight of the evidence. City of Chicago
v. Turner, 304 Ill. 502; Hurd v. Hurd, 304 Ill. 502. The
evidence that the account in Charlotte Harlan's name was in fact
her account was not convincing, while the evidence offered by
the defendants that the account belonged to her was unques-

tioned.

Under the circumstances the judgment should be affirmed.

APPROVED.

WATSON, J. Concur.

41762

GEORGE L. SPARBERG,
Appellee,

v.

ISADORE COHEN, JACK COHEN,
PHILLIP COHEN, HERBERT COHEN,
and MORT FISHER, individually
and as co-partners, d/b/a
B. COHEN & SONS,
Appellants.

APPEAL FROM

MUNICIPAL COURT OF CHICAGO.

313 I.A. 143¹

MR. PRESIDING JUSTICE MCSURELY DELIVERED THE OPINION OF THE COURT.

This is an appeal by the co-partners of B. Cohen & Sons from a judgment against them of \$7,555.15, entered upon the verdict of a jury, upon a trial wherein plaintiff sought to recover on two promissory notes executed by these defendants, by Julius Cohen, payable to the order of B. Colitz, who endorsed them and, as plaintiff alleges, delivered them to him for value received. Colitz was also a defendant, but he does not appeal from the judgment.

The defendants asserted that the notes sued upon were accommodation paper, executed at the request of B. Colitz, who was afterwards adjudicated a bankrupt. They denied that plaintiff paid anything for the notes and that he was an innocent holder for value before maturity, and alleged that his possession of the notes was the result of some arrangement with Colitz and was not in good faith. Defendants also assert that plaintiff at no time made demand for payment of these notes of the defendants until within a week prior to the expiration of the 10 year statute of limitations, when this suit was brought. Defendants further say that on the date of the maturity of each of the notes the defendants by check paid each of them in full, with interest, to the then rightful owner.

The evidence shows that both the plaintiff and defendants

GEORGE L. BROWN,
Appellee,

v.

ISAACSON COHEN, JAMES COHEN,
WILLIAM COHEN, HENRY COHEN,
and ROSE COHEN, Individually,
and as co-defendants, d/t/a
B. COHEN & SONS,
Appellants.

MR. PRESIDING JUDGE ROBERTSON delivered the opinion of the court.

This is an appeal by the co-defendants of B. Cohen & Sons from a judgment against them of \$7,888.15, entered upon the verdict of a jury, upon a trial wherein plaintiff sought to recover on two promissory notes executed by those defendants, by which Cohen, payable to the order of E. Solitz, who endorsed them and, as plaintiff alleges, delivered them to him for value received. Solitz was also a defendant, but he does not appeal from the judgment.

The defendants asserted that the notes and upon which accommodation paper, executed at the request of E. Solitz, who was afterwards adjudicated a bankrupt. They denied that plaintiff paid anything for the notes and that he was an innocent holder for value before maturity, and alleged that his possession of the notes was the result of some arrangement with Solitz and was not in good faith. Defendants also assert that plaintiff at no time made demand for payment of these notes at the defendant's office within a week prior to the expiration of the 10 year statute of limitations, when this suit was brought. Defendants further say that on the date of the maturity of each of the notes the defendants by check paid each of them in full, with interest, to the then rightful owner.

The evidence shows that both the plaintiff and defendants

are engaged in the waste material business and had known each other for a considerable time before the transactions here involved; Ben. Colitz was at one time wealthy: vice-president of the Superior Bank, and for a long time his credit was good; he was well acquainted with all the members of the defendant firm and was a brother-in-law of one of them - Mort Fisher; Colitz had extensive business deals with the partnership, but all of them were with Julius Cohen, the senior partner, who died in 1933. At one time Colitz had loaned Julius Cohen \$30,000 for the use of the partnership; in 1924 he frequently borrowed money from the partnership, obtaining their notes, signed by Julius Cohen, amounting in the aggregate to approximately \$30,000.

Plaintiff had at one time worked for Colitz in the waste material business, and in 1929 was president of the Michigan Mill Supply Co., dealing in waste paper; he knew the defendants, but only had financial dealings with Julius and Phillip Cohen.

On or about July 1, 1929, Colitz obtained from Julius Cohen two notes, for \$2,500 each; one of these was typewritten at Colitz's office by his stenographer before he brought it to Julius Cohen, and this note bears the typewritten signature of B. Cohen & Sons and was signed by Julius Cohen. The second note of that date for \$2,500 bore the printed signature of B. Cohen & Sons and was drawn in their office; this also was signed by Julius Cohen. Colitz testified that he discounted the note with the printed signature of the defendants with Gumbinsky Brothers, dealing with Nathan Gumbinsky. The other note, with the typewritten signature of the defendant partners, he endorsed and discounted with the plaintiff. Colitz testified that when he brought the note to plaintiff on July 3, 1929, he was indebted to plaintiff for a considerable sum for loans and other moneys;

and engaged in the waste material business and had known each other for a considerable time before the transactions were involved; Dan Colitz was at one time assistant vice-president of the Superior Bank, and for a long time his credit was good; he was well acquainted with all the members of the defendant firm and was a brother-in-law of one of them - Bert Fisher; Colitz had extensive business deals with the defendant, but all of them were with Julius Cohen, the senior partner, who died in 1933. At one time Colitz had loaned Julius Cohen \$25,000 for the use of the partnership; in 1934 he frequently borrowed money from the partnership, obtaining their notes, signed by Julius Cohen, amounting in the aggregate to approximately \$25,000.

Plaintiff had at one time worked for Colitz in the waste material business, and in 1935 was president of the defendant Mill Supply Co., dealing in waste paper; he knew the defendant but only had financial dealings with Julius and Phillip Cohen. On or about July 1, 1935, Colitz obtained from Julius Cohen two notes, for \$5,000 each; one of these was typewritten at Colitz's office by his stenographer before he brought it to Julius Cohen, and this note bears the typewritten signature of E. Cohen and was signed by Julius Cohen. The second note of that date for \$5,000 bore the printed signature of E. Cohen and was drawn in their office; this also was signed by Julius Cohen. Colitz testified that he disconnected the note with the printed signature of the defendant with handwriting experts, calling with Nathan Gushinsky. The other note, with the typewritten signature of the defendant partner, he analyzed and disconnected with the plaintiff. Colitz testified that when he brought the note to plaintiff on July 5, 1935, he was instructed to plaintiff for a considerable sum for loan and other money;

that this indebtedness was adjusted by receiving from plaintiff a check for the difference between the indebtedness and \$2,500, the face of the note. There was in evidence an entry of this transaction on the Cash Disbursement sheet of the Michigan Mill Supply Co., plaintiff's firm.

September 3, 1929, Colitz obtained from Julius Cohen two other notes, for \$2,000 each; one of these was typewritten by a stenographer in Colitz's office; this bore the typewritten signature of B. Cohen & Sons; he carried this to Julius Cohen, who signed it. The other note for \$2,000 bore the printed signature of B. Cohen & Sons; this was prepared in the office of Cohen & Sons and was there signed by Julius Cohen. The note with the typewritten signature of Cohen & Sons, was discounted with Nathan Gumbinsky. Colitz endorsed the \$2,000 note bearing the printed signature and delivered it to plaintiff, receiving for it \$300 cash and the check of the Michigan Mill Supply Co. for \$1,700 to the order of Ben. Colitz. The record of this transaction appears on the Cash Disbursement sheet of the Michigan Mill Supply Co.

The two checks which were drawn by the Michigan Mill Supply Co. to Colitz on July 3, and September 4, 1929, respectively, according to the testimony of plaintiff, were destroyed with other records. Plaintiff testified that he did not keep books long, and the only record of these transactions is in the Cash Disbursement book referred to. He testified that the entries in the book of cash disbursements were made by his bookkeeper, Miss. Goldstein, who was in California at the time of the trial. He testified that the entries showing these transactions of July and September, 1929, were made under his supervision and were true and correct; that the two checks given to Colitz were drawn

that this indorsement was obtained by receiving from Plaintiff a check for the difference between the indorsement and \$1,000, the face of the note. There was in evidence an entry of this transaction on the Cash Disbursement sheet of the Michigan Mill Supply Co., Plaintiff's firm.

September 4, 1923, Golitz obtained from Julius Cohen two other notes, for \$5,000 each; one of these was typewritten by a stenographer in Golitz's office; this bore the typewritten signature of J. Cohen & Sons; he carried this to Julius Cohen, who signed it. The other note for \$5,000 bore the printed signature of J. Cohen & Sons; this was prepared in the office of Cohen & Sons and was there signed by Julius Cohen. The note with the typewritten signature of Cohen & Sons, was accounted with Arthur Gaudin-Roy. Golitz cashed the \$5,000 note bearing the printed signature and delivered it to Plaintiff, receiving for it \$2500 cash and the check of the Michigan Mill Supply Co. for \$1,500 to the order of Ben. Golitz. The record of this transaction appears on the Cash Disbursement sheet of the Michigan Mill Supply Co.

The two checks which were drawn by the Michigan Mill Supply Co. to Golitz on July 5, and September 4, 1923, respectively, according to the testimony of Plaintiff, were destroyed with their records. Plaintiff testified that he did not keep books long, and the only record of these transactions is in the Cash Disbursement book referred to. He testified that the entries in the book of cash disbursements were made by his bookkeeper, Miss Goldstein, who was in California at the time of the trial. He testified that the entries showed these transactions as July and September, 1923, were made under his direction and with true and correct; that the two checks given to Golitz were drawn

on the Merchants National Bank of Battle Creek and cleared through that bank and were deducted from plaintiff's account.

Plaintiff testified that after the notes matured he talked many times with Julius Cohen during his lifetime about the notes, and also to Phillip Cohen. It is argued that the reason for the delay in bringing suit on the notes was that when plaintiff talked to Colitz, shortly after they became due, Colitz asked plaintiff to let the matter rest; that he (Colitz) "had certain matters to straighten out," and, "you don't need the money so bad;" that Colitz had several talks with plaintiff about the notes; that he did not wish to bother Julius Cohen, who had heart trouble; that he requested plaintiff not to press the payment of these notes, saying, "You won't lose a nickel on that and I don't want you to start a law suit; I may get help from my brothers-in-law and the rest of the Cohen family; that is what I hoped." Colitz says he gave plaintiff a diamond ring worth about \$1,000 as security for payment of the notes.

Defendants sought to support their theory of payment of these notes by the testimony of Nathan Gumbin - the same party referred to as Nathan Gumbinsky. He testified that Colitz delivered him the note of defendants for \$2,500, for which he paid Colitz, and that when the note matured he received a check from Cohen & Sons for the amount of the note, which note he returned to Colitz. He also testified to the similar transaction on September 3, 1929, when Colitz brought to his office defendants' note for \$2,000, for which he (Gumbin) gave Colitz a check for that amount. He testified that this note also was paid at maturity by check from the defendants.

Defendants argue earnestly that the notes which Gumbin discounted and which were paid by defendants, are the notes which

on the Metropolitan National Bank of Kansas City and cleared
through that bank and were deposited with Plaintiff's attorney.
Plaintiff testified that after the notes were turned to
him many times with which he was dealing during his lifetime would
the notes, and also in Plaintiff's hands. It is stated that the
reason for the delay in turning out on the notes was that when
Plaintiff asked to collect, usually after they became due, Golitz
asked Plaintiff to let the notes rest; that he (Plaintiff) "and
certain matters to strengthen me," and, "you don't need the
money so bad;" that Golitz had several times with Plaintiff about
the notes; that he did not wish to let Plaintiff know, who had
heard trouble; that he requested Plaintiff not to press the pay-
ment of these notes, saying, "you can't lose a nickel on that
and I don't want you to risk a few cents; I say not only from
my brother-in-law and the rest of the family; that is
what I hope." Golitz said he gave Plaintiff a diamond ring
worth about \$1,000 as security for payment of the notes.
Defendants now try to support their theory of payment of
these notes by the testimony of Arthur Guebin - the man who
received as a Kansas business. He testified that Golitz deliv-
ered him the note of defendants for \$5,000, for which he paid
Golitz, and that when the note matured he received a check from
Golitz in payment for the amount of the note, which note he returned
to Golitz. He also testified to the similar transaction on
September 1, 1900, when Golitz brought to his office a check for
not for \$5,000, for which he (Guebin) gave Golitz a check for
that amount. He testified that this note also was paid by water-
mark check from the defendants.
Defendants again submit that the notes which Guebin
received and which were paid by defendants, are the notes which

plaintiff introduced in evidence as the notes upon which this suit is brought. Gumbin did testify that the notes which he received from Colitz and which were subsequently paid, were the same as those introduced in evidence, marked plaintiff's Exhibits 1 and 2. The jury could properly believe Gumbin's testimony with reference to the two notes and their payment, but he was mistaken in identifying them as the notes introduced in evidence on behalf of plaintiff. It should be borne in mind that Colitz testified that on July 1, 1929, he obtained two notes from Julius Cohen, for \$2,500 each, and later, in September, obtained two other notes for \$2,000 each, and that he discounted one of these for \$2,500 with Gumbinsky Brothers, and, according to his recollection, also discounted a \$2,000 note with Gumbinsky.

Defendants argue that when Gumbin was paid for the two notes in his possession he returned them to Colitz, who turned them over to plaintiff after they had been paid and subsequent to maturity. Colitz denies that he ever had either of the notes (marked plaintiff's Exhibits 1 and 2, respectively,) in his possession or control after he delivered them to plaintiff in July and September. There is no definite denial of the testimony of either plaintiff or Colitz as to the transactions in July and September, 1929, and it is only by inference that their stories are assailed.

There are also other details tending to cast discredit on Gumbin's identification of plaintiff's notes with the notes which he discounted for Colitz and which were afterwards paid by the defendants. To examine all of these items would unduly lengthen this opinion. One item touches the check with which defendants say they paid Gumbin for their note held by him.

Plaintiff introduced in evidence as the notes which he
sent to Wright, certain old scribbles that the notes which he
received from Golitz and which were subsequently sold, were the
same as those introduced in evidence, marked Plaintiff's exhibits
1 and 2. The jury could properly believe Golitz's testimony with
reference to the two notes and their delivery, but he was mistaken
in identifying them as the notes introduced in evidence as Golitz's
of Plaintiff. It would be true in that Golitz testified
that on July 1, 1928, he obtained two notes from Julius Cohen,
for \$2,500 each, and later, in September, obtained two other
notes for \$2,500 each, and that he distributed one of these for
\$2,500 with monthly payments, and, according to his recollection,
also distributed a \$2,500 note with monthly.

Defendant argues that when Golitz was paid for the two
notes in the possession he retained them as Golitz, who turned
them over to Plaintiff after they had been paid and exchanged
to maturity. Golitz admits that he ever had either of the notes
(marked Plaintiff's exhibits 1 and 2, respectively), in his pos-
session or control after he delivered them to Plaintiff in July
and September. There is no definite record of the testimony of
either Plaintiff or Golitz as to the transactions in July and
September, 1928, and it is only by inference that their records
are recalled.

There are also other details tending to cast doubt
on Plaintiff's identification of Plaintiff's notes with the notes
which he distributed for Golitz and which were subsequently paid
by the defendant. He states all of these items would under-
stand in this opinion. One item topped the check with which
defendant says that Golitz for their note held by him.

This note is for \$2,500 with interest, and yet the check said to pay this does not include interest. Gumbin's explanation of this is uncertain, and he finally testified he did not know whether he received any interest on this note. There were also other discrepancies with reference to the interest. Taking the record as a whole, we cannot say that the verdict of the jury, accepting the testimony of the plaintiff as true, is manifestly against the weight of the evidence.

Defendants' next point is that in their motion for a new trial they presented an affidavit setting up newly discovered evidence which they say was not available to them at the time of the trial. This affidavit sets forth that two notes were signed on July 1, 1929, and two signed in September, 1929. No reason appears why all this documentary evidence could not have been produced by defendants upon the trial. In many details the alleged newly discovered evidence was not in accord with the evidence given upon the trial by defendants. For instance, the book which they offered to produce on their motion for a new trial shows that defendants purchased from Gumbin's company, between the years 1924 to 1936, goods amounting to \$25,000, and other items. This was directly contradictory of testimony on behalf of defendants that the defendant firm had no business with Gumbin's firm in 1928 and 1929.

The trial court was of the opinion that the alleged newly discovered evidence was untrustworthy, and at least subject to suspicion. In McDonald v. People, 123 Ill. App. 346, 363, it was held that under such circumstances a new trial should not be granted. And in Chicago A. R. Co. v. Raidy, 203 Ill. 310, 317, it was said that courts should not allow newly discovered evidence as a basis for a new trial because one party is not

This note is for \$2,500 with interest, and yet the check said to pay this does not include interest. Gumbin's explanation of this is uncertain, and he finally testified he did not know whether he received any interest on this note. There were also other discrepancies with reference to the interest. Taking the record as a whole, we cannot say that the verdict of the jury, accepting the testimony of the plaintiff as true, is manifestly against the weight of the evidence.

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satisfied with the results of the trial and attempts to get facts which will enable him to do better at another trial. For these and other reasons the court properly did not grant a new trial on the ground presented in the affidavit.

It is said the court gave improper instructions to the jury over the objections of the defendants. Neither the record nor the abstract indicates who presented and requested any instructions. Each of them is followed by the word "Given," but there is no way to determine at whose instance they were given. Sullivan v. Ohlhaber Co., 291 Ill. 359. Moreover, defendants made no specific objections to the instructions before the jury retired. Rule 62(3) of the Municipal court provides that objections to instructions must be made before the jury retires and specifically point out the objectionable matters. Paulick v. National Bank of Republic, 279 Ill. App. 160.

It is said that the signing of accommodation paper was foreign to the business of the defendants, but the evidence shows that Colitz and defendants had for many years past had transactions of this sort. Although it is argued in defendants' brief, yet the record shows conclusively that Julius Cohen had authority to sign the two notes held by plaintiff. It was not denied that Julius Cohen had undivided charge of the finances of the defendant firm. He was the oldest member of the family and the senior partner of the firm, and, as we have said, Colitz at one time loaned the partnership a large sum of money, which Julius Cohen reciprocated at a later date.

It was not reversible error to deny the request of the defendants to open and close the argument to the jury. The general rule is that whenever the plaintiff has anything to prove in order to secure a verdict, the right to open and close argument

satisfied with the results of the trial and allowed to rest his case which will enable him to be better prepared for the second trial and other reasons the court properly did not grant a new trial on the ground presented in the affidavit.

It is said the court gave improper instructions to the jury over the objections of the defendant. Neither the record nor the abstract indicates any such instructions and requested any instructions. Each of them is followed by the word "given", but there is no way to determine at whose instance they were given. Sullivan v. Gilman Co., 201 Ill. 502. Moreover, defendant made no specific objections to the instructions before the jury retired. Rule 82(3) of the Illinois court provides that objections to instructions must be made before the jury retires and specifically point out the objectionable matter. People v. National Bank of Republic, 73 Ill. App. 100.

It is said that the timing of accommodation paper was foreign to the business of the defendant, but the evidence shows that Golitz and defendant had for many years past had transactions of this sort. Although it is argued in defendant's brief, yet the record shows conclusively that Julius Cohen had authority to sign the two notes held by plaintiff. It was not denied that Julius Cohen had undivided charge of the finances of the defendant firm. He was the oldest member of the family and the senior partner of the firm, and, as we have said, Golitz at one time loaned the partnership a large sum of money, which Julius Cohen reciprocated at a later date.

It was not reversible error to deny the request of the defendant to open and close the argument to the jury. The general rule is that whenever the plaintiff has anything to prove in order to secure a verdict, the right to open and close argument

belongs to him. Liptak v. Security Benefit Assn., 350 Ill. 614. In the present case, in addition to the plea of payment, the defendants insisted on proof of plaintiff's case and cross-examined him with the intention of showing that he was not a holder for value of the notes. They also objected to plaintiff's exhibits which were offered to supplement the proof as to the circumstances under which the notes were given to plaintiff by Colitz. The court committed no error in following the usual procedure for the opening and closing of argument.

The jury were instructed that if they should find for the plaintiff the verdict would be, "We, the jury, find for the plaintiff *** with \$ _____ damages." Defendants say that this verdict and judgment were proper as to Colitz but not as to them. The record fails to show any objection in the trial court to the form of the judgment order. Moreover, the entire controversy was between the plaintiff and the firm of B. Cohen & Sons. Colitz made no defense and does not appeal. Under Rule 63 of the Municipal court and § 68 of the Civil Practice Act the form of the verdict returned by a jury is not fixed by any rule of law. In Western Springs Park Dist. v. Lawrence, 343 Ill. 302, it was held that all reasonable intendments will be indulged in support of a verdict and it will not be held insufficient unless, through necessity, there is doubt as to its meaning. Moreover, where relief has been asked against several defendants, a general verdict for plaintiff will be construed as a verdict against all defendants. 64 C. J. 1107, § 912; New York, T. & M. Ry. Co. v. Gallaher, 79 Tex. 685.

The trial court expressed his opinion that substantial justice had been done in this case, and indicated that in his

belong to him. People v. People's Bank, 201 Ill. 201. In the present case, in addition to the fact of payment, the defendant insisted on proof of plaintiff's care and order - and insisted him with the intention of showing that it was not a matter for value of the notes. They also objected to plaintiff's exhibits which were offered to supplement the proof as to the circumstances under which the notes were given to plaintiff by Galitz. The court committed no error in following the usual procedure for the opening and closing of arguments. The jury was instructed that if they should find for the plaintiff the verdict would be, "yes, the jury, find for the plaintiff" and if they should find for the defendant, "no, the jury, find for the defendant" and judgment was proper as to Galitz but not as to the record fails to show any objection in the trial court in the form of the judgment entered. Moreover, the entire controversy was between the plaintiff and the State of W. Jones & Son. The life made no reference and does not appear. Under rule 20 of the Municipal Court and 103 of the Civil Practice Act the form of the verdict returned by a jury is not fixed by any rule of law. In People v. People's Bank, 201 Ill. 201, it was held that all statements introduced will be admitted in support of a verdict and it will not be held irrelevant unless, through necessity, there is doubt as to its meaning. Moreover, where relief has been asked against several defendants, a general verdict for plaintiff will be considered as a verdict against all defendants. 201 Ill. 201; 201 Ill. 201; 201 Ill. 201. The trial court erred in the relation that was established in his

opinion the verdict was right. Under such circumstances a reversal should not be ordered except for grave errors, which, if they had not occurred, would have resulted in a different verdict. Muller v. Equitable Life Assur. Society, 293 Ill. App. 555; Convert v. Bishop & Babcock Co., 152 Ill. App. 516. And in West Chicago St. R. Co. v. Maday, 188 Ill. 308, the court said, "It is more important in the administration of justice that litigation should end in the attainment of substantial justice, than that a record of the proceedings should be built up which is without flaw or blemish."

We find nothing in the record that would justify a reversal, and as it cannot be said the verdict is manifestly against the weight of the evidence, the judgment is affirmed.

AFFIRMED.

Matchett, and O'Connor, J.J., concur.

opinion the verdict was right. Under such circumstances a reversal should not be ordered except for grave error, which, if they had not occurred, would have resulted in a different verdict. Kuller v. Hamilton Life Ins. Co., 107 Ill. App. 335; Forrest v. Chicago & Eastern Ry. Co., 107 Ill. App. 335. In West Chicago Ry. Co. v. Kuller, 107 Ill. App. 335, the court said, "It is more important in the administration of justice that litigation should end in the attainment of substantial justice, than that a record of the proceedings should be built up which is without flaw or blemish."

We find nothing in the record that would justify a reversal, and as it cannot be said the verdict is manifestly against the weight of the evidence, the judgment is affirmed.

affirmed.

WATCHETT, and O'NEILL, J.J., concur.

41802

HENRY WOLTHAUSEN,
Appellee,

v.

HELENE LEDERER, et al.,
Defendants

On Appeal of THE SHURTLEFF
COMPANY, and MERCER LUMBER
COMPANIES,

Appellants.

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

313 I.A. 143²

MR. PRESIDING JUSTICE MCSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff filed his complaint to remove as clouds on his title to real estate, a lease and option to purchase in favor of defendant Helene Lederer, and also certain mechanics' lien claims; answers and claims were filed and the cause was referred to a master, who filed his report recommending that plaintiff's prayer as to Helene Lederer be granted and that the mechanics' lien claims be allowed. The Shurtleff Company's claim was for \$1,608.14, with interest. The Mercer Lumber Companies' claim was for \$253.11, with interest. The chancellor sustained exceptions to the report as to the claims of The Shurtleff Company and the Mercer Lumber Companies and denied their lien claims, and they appeal.

A brief recital of the facts is called for. Plaintiff is a retired farmer, a cripple and over 70 years of age; he lived within the village limits of Barrington, Illinois; he owned a 12 acre farm within the village limits, about a mile from his residence, which had on it a one-family residence, a barn and two garages. Defendant Helene Lederer is a real estate broker, and on April 19, 1937, she obtained a lease from plaintiff for the farm and buildings at a rental of \$30 a month for one year, and

HENRY WELTHAMER,
Appellee,

v.

WELSH LUMBER, et al.,
Defendants

On Appeal of the
Circuit Court of the
County of Cook,
Illinois.

CIRCUIT COURT,
DEPT. COURT.

41802

MR. JAMES J. WELSH, JR., COUNSEL FOR THE DEFENDANTS.

Plaintiff filed his complaint to remove his share on his title to real estate, a lease and option to purchase in favor of Defendant Henry Welsh, and also certain mortgages, and claims; and also his report recommending that plaintiff's to a master, who filed his report recommending that plaintiff's prayer as to Henry Welsh be granted and that the mortgages, lien claims be allowed. The plaintiff's claim was for \$1,608.14, with interest. The master's report recommended that the plaintiff's claim was for \$1,608.14, with interest. The chancellor sustained the plaintiff's claim as to the claims of the plaintiff's company and the master's report companies and denied their lien claims, and they appeal.

A brief recital of the facts is called for. Plaintiff is a native born, a couple and over 70 years of age; he lived within the village limits of Barrington, Illinois; he owned a lot of land within the village limits, about a mile from his residence, which had on it a one-family residence, a barn and two garages. Defendant Henry Welsh is a real estate broker, and on April 15, 1917, the defendant's agent from plaintiff for the term and building at a rental of \$20 a month for the year, and

took possession. The lease contains the usual clause that she has received the premises in good order and repair, and upon the termination of the lease will yield them up to the lessor in good condition and repair, ordinary wear excepted. The lease contains no permission to build, remodel or otherwise change the premises.

May 25, 1937, she had an option from the plaintiff to buy the premises on or before April 30, 1938 for \$8,000. This option contained no clauses permitting the premises to be changed or remodeled.

Shortly thereafter she began to reconstruct the house on the farm by converting it from a single family into a two-family dwelling. For this purpose she bought lumber from The Shurtleff Company, who made their first delivery July 2, 1937, and also from the Mercer Lumber Companies, who commenced to deliver in March, 1938. Plaintiff testified that he knew nothing about these proposed changes until about the middle of August, 1937 when he visited the premises.

There was in existence in the Village of Barrington at this time an ordinance forbidding any person from erecting, altering or repairing any building in the village without first obtaining a permit so to do from the Building Commissioner of the village. It is conceded that no permit was obtained to make the alterations in the building.

There was also in existence in the village a zoning ordinance which provided that no buildings should be erected, altered or used, in the district in which the building in question was located, except for "Single Family Dwellings." This ordinance contained a provision that no building should be altered until the Building Commissioner issues a certificate that the proposed

took possession. The lease contains the usual clause that the
has received the premises in good order and repair, and upon
the termination of the lease will yield them up to the lessor
in good condition and repair, without any deduction. The lease
contains no permission to build, removal or other use of the
the premises.

On 28, 1937, the lessor and option from the plaintiff to
pay the premises on or before April 30, 1938 for \$5,000. This
option contained no clause permitting the premises to be changed
or removed.

Shortly thereafter the lessor began to reconstruct the house
on the farm by converting it from a single family into a two-
family dwelling. For this purpose the plaintiff leased the
plaintiff company, and made their first delivery July 1, 1937,
and also from the Western Lumber Company, and continued to do
live in there, 1938. Plaintiff testified that he knew nothing
about these proposed changes until about the middle of 1937,
1937 when he visited the premises.

There was in existence in the Village of Lexington at
this time an ordinance forbidding any person from erecting, al-
tering or repairing any building in the village without first
obtaining a permit so to do from the Building Commissioner of the
village. It is conceded that no permit was obtained to make
the alterations in the building.

There was also in existence in the village a zoning
ordinance which provided that no building shall be erected,
altered or used, in the district in which the building in question
was located, except for "single family dwelling". This ordinance
contained a provision that no building shall be altered until the
Building Commissioner issues a certificate that the proposed

altered building complies with the building ordinances, and no permit to alter or change a building shall be issued to make a change which is not in conformity with the provisions of the zoning ordinance.

Plaintiff argues that the violation of this ordinance forfeited the lumber companies' right to a claim for benefits under the Mechanics' Lien statute, and this was the opinion of the chancellor, as shown by the record. The chancellor cited in support of his opinion, Bairstow v. Northwestern University, 287 Ill. App. 424, where the right to a mechanic's lien was denied, as the work to be done was in violation of the zoning ordinances and the Evanston building code.

Defendants argue that the ordinance does not apply to those furnishing materials, but only to workmen erecting or altering the structure. The point is not well taken. The erection, alteration or construction of any structure implies the use of materials. To erect or alter a building without materials is, obviously, impossible. It follows, therefore, that the furnishing of materials to be used in a building is included in the conditions named in the zoning ordinance.

We hold that the lumber companies were not excused from inquiring into the use to be made of the materials furnished by them, and whether its use was a valid and legal one. Manager of The Shurtleff Company, Paulson, testified that Helene Lederer came into their office and ordered some lumber to use on the Wolthausen place, saying she had bought the property. No inquiries were made of plaintiff as to whether it was proper to deliver this lumber, nor as to the use to be made of it. Paulson also advised with Helene Lederer and assisted in the selection of materials for the remodeling job. He also saw the job as it progressed.

altered building completed with the building ordinance, and on permit to alter or change a building shall be issued to make a change which is not in conformity with the provisions of the zoning ordinance.

Plaintiff argues that the violation of this ordinance forfeited the lumber companies' right to a trial on the merits under the "mechanic's lien statute," and that was the basis of the chancellor's decision by the record. The chancellor acted in support of his opinion, Waller v. Waller & Waller, 287 Ill. App. 424, where the right to a mechanic's lien was denied, as the work to be done was in violation of the zoning ordinance and the zoning building code.

Defendant argues that the ordinance does not apply to these furnishing materials, but only to certain zoning in altering the structure. The point is not well taken. The violation, alteration or construction of any structure is the use of materials, so that in this building almost all the use of materials, is, obviously, immaterial. It follows, therefore, that the furnishing of materials to be used in a building is included in the conditions named in the zoning ordinance.

It is held that the lumber companies were not estopped from insisting that the use of the materials be furnished by them, and that the use was a valid and legal one. Defendant of the Plaintiff Company, Plaintiff, testified that Nelson Lumber came into their office and ordered some lumber on the following day, saying she had bought the property. No further was said of Plaintiff as to whether it was proper to deliver this lumber, nor as to the use to be made of it. Plaintiff also advised with Nelson Lumber and testified to the relation of materials for the remodeling job. He also was the job as it

The same things are true with reference to the Mercer companies. They made no inquiry as to the use to be made of the materials. The alterations and construction of the building in question was in violation of the ordinance which does not permit the construction of a two-family dwelling in this district. The lumber companies are charged with knowledge of the existence of this ordinance and it is a fair inference that they knew the alteration of the building violated the ordinance. They cannot assert a claim to a lien based upon its violation. As was said in Brown & Co. v. Owens, 248 Ill. App. (abst.) 661: "It is a well established principle of law that a contract, which, by its terms, violates a statute or a city ordinance, is not enforceable; and courts of law will not relieve where the parties are undertaking by contract to do something expressly prohibited either by statute or ordinance." And in Western Cold Storage Co. v. Estate of Kaufman, 204 Ill. App. 477, it was said that "There can be no enforceable contract, either express or implied, which by its terms violates a statute or city ordinance." In Ellison v. Adams Express Co., 245 Ill. 410, it was held that courts of justice will not assist parties "who have participated" in any transaction forbidden by statute, and that "The law will not lend its aid to enforce a demand having its origin in a breach of the law itself." It has been held in many cases that there is no enforceable contract which violates a city ordinance. Western Cold Storage Co. case, supra; Tananevich v. Lamczyk, 134 Ill. App. 135; Goodrich v. Tenney, 144 Ill. 422.

Construing the language of the zoning ordinance in question as applying to those furnishing materials as well as to others, the conclusion is obvious that by participating in the illegal attempt to violate the ordinance the materialmen furnish-

The same thing has been said with reference to the power
companies. They made no inquiry as to the use to be made of the
materials. The situation and construction of the building in
question was in violation of the ordinance which does not permit
the construction of a two-family dwelling in this district. The
number companies are charged with knowledge of the existence of
this ordinance and it is a fair inference that they knew the
violation of the building violated the ordinance. They cannot
assert a claim as a lien based upon the violation. As was said
in Brown & Co. v. Town, 288 Ill. 401, 1917, 121: "It is a
well established principle of law that a contract, when, by its
terms, violates a statute or a city ordinance, is not enforce-
able; and courts of law will not enforce such a contract and
unlawful by contract to be enforced is expressly prohibited
either by statute or ordinance." and in Gold Storage Co.
v. Estate of Kohnen, 304 Ill. App. 477, it was said that there
can be no enforceable contract, either express or implied, which
by its terms violates a statute or city ordinance." In Illinois
v. Adams Express Co., 288 Ill. 410, it was held that courts of
justice will not assist parties "who have participated" in any
transgression forbidden by statute, and that "the law will not
lend its aid to enforce a demand having its origin in a breach
of the law itself." It has been held in many cases that there
is no enforceable contract which violates a city ordinance. See
Gold Storage Co. v. Estate of Kohnen, 304 Ill. App. 477, 124
Ill. App. 477; Gold Storage v. Town, 288 Ill. 410.

Concerning the language of the ordinance in question is
question as to those provisions which are well as in
question, the ordinance is so clear that it is not necessary to
illegal attempt to violate the ordinance and construction lawfully

ing lumber for this purpose cannot enforce their right to a lien.

Defendants contend that the plaintiff had knowledge that Helene Lederer intended to alter the building in violation of the village ordinances. The evidence does not support this claim. As we have seen, he testified that the first he knew of the alterations was about the middle of August, 1937, at which time the alterations were almost completed.

In certain cases lien claims have been allowed on the ground that the property has been benefited by the changes, and that the owner, in equity, should not be relieved of the liability of paying for such changes. Colp v. First Baptist Church, 341 Ill. 73. In the instant case the contrary is the fact, as both the master and the chancellor have found that the premises were damaged to the extent of \$1,000, which would be the cost of restoring the house to a single-family dwelling so that plaintiff will be relieved of prosecution under the zoning laws.

The general equities of this case are with the plaintiff. Lederer gets possession of plaintiff's property under a short term lease; she procures an option to purchase, for which she pays nothing; she proceeds, without the knowledge of the owner, to alter the building, in violation of the village ordinances; she defaults in her contract to purchase and leaves plaintiff in possession of a building which will cost him a substantial sum of money to restore to its original legal status.

The material men should look for payment to Helene Lederer, who ordered the lumber, and not to a lien on the owners property.

The decree worked justice, and for the reasons indicated, is affirmed.

AFFIRMED.

Mr. Justice O'Connor, concurs.
Mr. Justice Matchett, dissents.

the latter for this purpose cannot enter into a line
defendant content that the plaintiff has knowledge
that before defendant intended to enter the building in violation
of the village ordinances, the evidence was not sufficient to
show, as we have seen, he testified that the first he knew of
the situation was about the middle of August, 1934, at which
time the situation was almost hopeless.
In certain cases like this have been shown on the
ground that the property has been devoted to the public use,
that the owner, in equity, should not be relieved of the liability
of paying for such damage. City v. City of New York, 201
Ill. 73. In the instant case the contrary is the fact, as both
the master and the non-resident have shown that the premises were
devoted to the extent of \$1,000, which would be the cost of
reverting the house to a single-family dwelling in City of New York
will be relieved of prosecution under the zoning laws.
The general doctrine of this case now with the plaintiff
before the possession of plaintiff's property under a short
term lease; the proceeds in option to purchase, for which the
party holding; the proceeds, without the knowledge of the owner,
to enter the building, in violation of the village ordinances;
the defendant in her contract to purchase and later plaintiff
in possession of a building which will now be a residential
use of money to restore to its original level.
The plaintiff now would lose the present to the defendant
and, and other the latter, and not to a line as the owner
property.
The answer would justify, and for the reasons indicated,
is affirmed.

W. Justice Mendenhall, dissenting.
W. Justice Mendenhall, dissenting.

40863

JAMES BROWN, a minor by HERMAN E. BROWN, his father and next friend, Appellee,

v.

JAMES MURRAY and HARRY SMITH, Appellants.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

313 I.A. 144

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

On July 31, 1935, plaintiff (then a child between six and seven years of age) was severely injured by a truck owned by defendant Murray and driven by defendant Smith. He sued for damages by his father, as next friend. There was trial by a jury, verdict for plaintiff for \$1500, motion for a new trial overruled, and judgment on the verdict. Defendants appeal contending there was no negligence, that an instruction in defendants' favor requested at the close of the evidence should have been given, and that the verdict returned is against the manifest weight of the evidence.

The home of plaintiff and his family was at 1317 Massasoit Avenue in Chicago. St. Angelas School was situated at the northwest corner of Potomac Avenue and Massosoit Avenue opposite his home. Plaintiff attended the school. It was conducted for children of the primary and up to the eighth grade. A. J. Keenan was the janitor and engineer and took care of the school grounds on which there were located two buildings - the main school building and a portable building. To the east was a play yard open for the use of all the children. There were no written rules or regulations with reference to the use of it. The playground was used when school was in session and also during vacation.

Defendant Murray owned the truck and employed defendant Harry Smith as the driver of it. A colored helper named Ewing

ing number for this purpose cannot be used for a line.
Defendants contend that the Plaintiff has no right
that Helen's husband intended to alter the condition in violation
of the village ordinance. The evidence does not support this
claim. As we have seen, he testified that the first he knew of
the alterations was about the middle of August, 1937, at which
time the alterations were almost completed.
In certain cases then these have been shown to the
ground that the property has been occupied by the owner, and
that the owner, in equity, should not be relieved of the liability
of paying for such repairs. City of New York v. Egan, 241
Ill. 73. In the instant case the contract is for the repair of the
to the water and the owner has been shown that the repairs were
damaged to the extent of \$1,000, which would be the cost of
restoring the house to a single-family dwelling as the Plaintiff
will be relieved of prosecution under the zoning laws.
The general nature of this case and with the Plaintiff.
Helen gave possession of Plaintiff's property under a contract
term lease; she reserves an option to purchase, but when she
pays nothing; she proceeds, without the knowledge of the owner,
to alter the building, in violation of the village ordinance;
the Plaintiff in her contract to purchase and leaves Plaintiff
in possession of a building which will cost him a substantial
sum of money to restore to its original condition.
The material was shown for payment to Helen's husband,
and not to a firm or person.
The house was not injured, and the Plaintiff's
is entitled.

W. Justice (Plaintiff), Attorney.
W. Justice (Defendant), Attorney.

40863

JAMES BROWN, a minor by HERMAN E. BROWN, his father and next friend, Appellee,

v.

JAMES MURRAY and HARRY SMITH, Appellants.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

313 I.A. 144

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

On July 31, 1935, plaintiff (then a child between six and seven years of age) was severely injured by a truck owned by defendant Murray and driven by defendant Smith. He sued for damages by his father, as next friend. There was trial by a jury, verdict for plaintiff for \$1500, motion for a new trial overruled, and judgment on the verdict. Defendants appeal contending there was no negligence, that an instruction in defendants' favor requested at the close of the evidence should have been given, and that the verdict returned is against the manifest weight of the evidence.

The home of plaintiff and his family was at 1317 Massasoit Avenue in Chicago. St. Angelas School was situated at the northwest corner of Potomac Avenue and Massosoit Avenue opposite his home. Plaintiff attended the school. It was conducted for children of the primary and up to the eighth grade. A. J. Keenan was the janitor and engineer and took care of the school grounds on which there were located two buildings - the main school building and a portable building. To the east was a play yard open for the use of all the children. There were no written rules or regulations with reference to the use of it. The playground was used when school was in session and also during vacation.

Defendant Murray owned the truck and employed defendant Harry Smith as the driver of it. A colored helper named Ewing

JAMES BROWN, a minor by appointment,
BROWN, his father and next friend,
Appellants,
v.
JAMES BROWN and JAMES BROWN,
Appellants.

MR. JUSTICE LATIMER delivered the opinion of the court.

On July 21, 1932, plaintiff (then a child between six and seven years of age) was severely injured by a truck owned by defendant Harry and driven by defendant William. He was damaged by his father, as next friend. There was trial by jury, verdict for plaintiff for \$100, motion for a new trial overruled, and judgment on the verdict. Defendant appeals claiming that in instruction in defendant's favor requested at the close of the evidence should have been given, and that the verdict returned is against the weight of the evidence.

The home of plaintiff and his family was at 1119 West 1st Avenue in Chicago. St. Ignace School was situated at the northwest corner of Towson Avenue and Westcott Avenue adjacent to his home. Plaintiff attended the school. It was conducted for children of the primary and up to the eighth grade. I. J. Kennan was the janitor and engineer and took care of the school grounds on which there were about two buildings - the main school building and a portable building. To the east was a large yard open for the use of all the children. There were no written rules or regulations with reference to the use of it. The playground was used when school was in session and also during vacation.

Defendant Harry owned the truck and employed defendant Harry Smith as the driver of it. A colored helper named Harry

was employed by the Catholic Salvage Bureau. He went along with the truck which was driven to the school grounds for the purpose of gathering up waste paper, rags, etc. which might have accumulated there. Sometimes people of the parish would bring such material to the school for distribution.

The truck was the average type of commercial truck. The body was 12 feet long, 6 feet high and 6 feet wide. It had a partial panel and a box tarpaulin cover. The entire length of the truck was about 20 feet. It had pneumatic tires and the usual equipment. The cab of the truck had a door on each side with a window in it. The glass part of the door could be rolled down to give air to the driver. There was also a window back of where the driver sat so (if he did not have a full load) he could look and see where he was going in case he backed up. The truck was equipped with a standard rear view mirror, which was outside the cab part of the truck. At a glance the driver could see what was behind him. The mirror was to the left of the driver and in good working order. The truck was equipped with the standard type of horn.

About noon of the day in question the truck approached the school yard from the west. Plaintiff was sitting in front of his home across the street with his brother David, (who was a year older) and several other boys - Edward Alary, George Lahey, James Curran, Bernard Logan and Albert Morgan. Just before the truck turned into the school yard these boys got on the tail end of it and appropriated it to their own use. The truck was driven into the yard, then toward the portable building from the door of which the material it carried away was usually received. The driver came into the yard facing east and then made a U-turn. At this time he was close to the portable building and on the

was employed by the Catholic Salvage Bureau. He went long into the truck which was driven to the school grounds for the purpose of gathering up waste paper, rags, etc. which might have been used there. Sometimes people of the parish would bring such material to the school for distribution.

The truck was the average type of commercial truck. The body was 12 feet long, 6 feet high and 7 feet wide. It had a partial panel and a box tarpaulin cover. The entire length of the truck was about 30 feet. It had pneumatic tires and the cab of the truck had a door on each side with a window in it. The glass part of the door could be rolled down to give air to the driver. There was a 3-window back of where the driver sat so (if he did not have a full load) he could look and see where he was going in case he backed up. The truck was equipped with a standard rear view mirror, which was outside the cab part of the truck. At a glance the driver could see what was behind him. The mirror was to the left of the driver and in good working order. The truck was equipped with the standard type of horn.

About noon of the day in question the truck approached the school yard from the west. Plaintiff was sitting in front of his home across the street with his brother David, who was a year older) and several other boys - Edward Albee, George Loney, James Curran, Bernard Lohan and Albert Morgan. Just before the truck turned into the school yard these boys got on the tail end of it and appropriated it to their own use. The truck was driven into the yard, then toward the building building from the rear of which the material it carried away was usually removed. The driver came into the yard facing east and then made a U-turn. At this time he was close to the portable building and on the

north side of it. He says that at no time did he know that there was anybody on the truck. The truck stopped and just before it stopped all these boys except the plaintiff got off. Plaintiff followed and either at the time he was getting off or just after he was off, the truck backed up and struck him, causing the injuries for which he sues.

These injuries were serious. He was taken to St. Anne's Hospital.

Plaintiff says that the driver told the boys to get off. His brother David testifies to the same effect. The defendants contend that this is the crucial point in the case; that from this evidence only would the jury be able to find that the driver knew of the presence of plaintiff and the other boys on the truck. Defendant says it is apparent from all the evidence that the case was sent to the jury only because it was possible to infer from the testimony that if the driver told the boys to get off the truck he must have known they were on it. It is said that if the driver of the truck did not know the boys were on it, and if there was no one else in the yard to watch out for, no negligence could be attributed to the driver in backing up his truck. Defendants say: "Hence the only possible theory, if theory there is, on which the plaintiff could hope to make a case, would be that the driver because of his yelling, knew that the boys were on the truck".

Defendants then argues that the testimony of these children of tender age (so tender that they could not be charged with contributory negligence) was not entitled to the same weight as that of adults and could not be believed against the testimony of all other witnesses whose evidence it is said was to the contrary. Defendants cites C. B. & Q. R. R. v. Stump, 69 Ill.

North side of it. He says that at no time did he know that there was anybody on the truck. The truck stopped and that instant it stopped all these boys except the plaintiff got off. Plaintiff followed and after at the time he was walking off or just after he was off, the truck backed up and struck him, causing the injuries for which he sues.

These injuries were serious. He was taken to St. Anne's Hospital.

Plaintiff says that the driver told the boys to get off. His brother would testify to the same effect. The defendant contends that this is the crucial point in the case; that from this evidence only could the jury be told of the fact the driver knew of the presence of plaintiff and the other boys on the truck. Defendant says it is apparent from all the evidence that the case was sent to the jury only because it was necessary to infer from the testimony that if the driver told the boys to get off the truck he must have known they were on it. It is said that if the driver of the truck did not know the boys were on it, and if there was no one else in the yard to watch out for, no negligence could be attributed to the driver in backing up his truck. Defendant says: "Hence the only possible theory, if there is, in which the plaintiff would have to win a case, would be that the driver because of his failure, knew that the boys were on the truck".

Defendant then argues that the testimony of these children of tender age (no tender that they could not be charged with contributory negligence) was not entitled to the same weight as that of adults and could not be believed against the testimony of all other witnesses whose evidence it is said was to the contrary. Defendant cites W. H. B. v. B. H. B., 22 Ill.

411. This is not, we think, a fair statement of the case. While the other boys do not corroborate the evidence of plaintiff to the effect that the driver told him to get off, they and other witnesses give evidence from which the jury had a right to believe the driver of the truck was not unaware of the presence of these boys. Practically all the evidence is to the effect that while the boys were riding on the truck they were laughing and yelling so loud as to be heard across the street. It is reasonable to believe therefore the driver, too, must have heard them. Four of the boys at the time the truck stopped in the school yard were running from the rear end of the truck and some of these were in the direct vision of the driver looking back from his seat. The evidence also is to the effect that just after the four boys jumped off and before plaintiff reached the ground the boys were yelling to plaintiff to get off. The windows of the cab door, it is reasonable to believe, were open. The weather was fair. We think the jury might reasonably believe the driver heard these calls to the boy. Moreover, Keenan, the janitor, a witness for defendants said that he saw plaintiff getting off the truck and called out to him to stay there. This was within the hearing of the driver. We hold, it was a question for the jury whether the driver, in the exercise of due care, knew or ought to have known that there were children at the rear of his truck who would be endangered through backing it up. The plaintiff was of tender years. As a matter of law, he could not be held guilty of contributory negligence. Maskaliunas v. C. & W. I. R. R. Co., 318 Ill. 142. There was evidence from which the jury could reasonably find the defendants negligent. We hold the case was properly submitted to the jury.

Defendants contend (citing a large number of cases)

-4-

All, this is not, we think, a fair statement of the case. While the other boys do not corroborate the evidence of Plaintiff to the effect that the driver told him to get off, they and other witnesses give evidence from which the jury may fairly believe the driver of the truck was not aware of the presence of these boys. Practically all the evidence is to the effect that while the boys were riding on the truck they were laughing and yelling so loud as to be heard across the street. It is reasonable to believe therefore the driver, too, must have heard them. Four of the boys at the time the truck stopped in the school yard were running from the rear end of the truck and some of these were in the direct vision of the driver looking back from his seat. The evidence also is to the effect that just after the four boys jumped off and before Plaintiff reached the ground the boys were yelling to Plaintiff to get off. The windows of the cab door, it is reasonable to believe, were open. The weather was fair. We think the jury will reasonably believe the driver heard these calls to the boy, Carpenter, Logan, the janitor, a witness for defendant said that he saw Plaintiff getting off the truck and called out to him to get off. This was within the hearing of the driver. We hold, it was a question for the jury whether the driver, in the exercise of due care, knew or ought to have known that there were children in the rear of his truck who would be endangered through backing it out. The Plaintiff was of tender years. As a matter of law, he could not be held guilty of contributory negligence. Massachusetts v. U. S. F. & L. Co., 131 U.S. 121. There was evidence from which the jury reasonably may find defendant negligent. We hold the case was properly submitted to the jury. Defendant wanted (stating a large number of cases)

plaintiff was a trespasser on defendants' truck and that defendants owed no duty to him other than that they should not wilfully and wantonly injure him. The cases cited are too numerous to review but all easily distinguishable. Whether plaintiff was a trespasser or not he was certainly no longer a trespasser after he reached the ground, where the evidence tends to show he was injured. Cases cited (such as Margolis v. Bremner Bros., 218 Ill. App. 304,) are not applicable. The question of whether plaintiff at the time he was injured was a trespasser was for the jury.

The case was rightfully submitted to the jury, the verdict is not manifestly against the preponderance of the evidence; and the judgment will be affirmed.

AFFIRMED.

McSurely, P. J., and O'Connor, J., concur.

plaintiff was a passenger on defendant's truck and defendant
was under no duty to him other than that he should not willfully
and wantonly injure him. The case cited and the numerous
review but all easily distinguishable. Plaintiff was
a trespasser or not on the property of defendant's company after
he reached the ground, where the evidence tends to show he was
injured. Cases cited (such as Smith v. H. H. H., 111
App. 3d, 100) are not applicable. The question of whether plaintiff
at the time he was injured was a trespasser or not is
the same as whether plaintiff is in the jury, the
verdict is not necessarily against the presumption of the
evidence; and the judgment will be affirmed.

ATTORNEYS.

McGinnis, J. C., and C. H. H., counsel.

41743

IRA ORBAN,

Appellee,

v.

CITY OF CHICAGO,

Appellant.

APPEAL FROM CIRCUIT COURT, COOK COUNTY.

313 I.A. 144²

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

In an action to recover damages for personal injuries upon trial by jury there was a verdict for plaintiff in the sum of \$3,250 with judgment after motions for a new trial and in arrest had been overruled. Defendant appeals.

The negligence alleged was that the City with constructive notice permitted a sidewalk to become and be in a dangerous condition, whereby plaintiff fell and was injured. The defendant contends for reversal that it was not guilty of negligence in maintaining the sidewalk and that the evidence does not disclose plaintiff at the time she received her injuries was in the exercise of due care.

The accident in which plaintiff was injured occurred on the evening of March 19, 1937, about 7 o'clock P.M. Plaintiff lived at 2415 South Albany Avenue in Chicago, a street running north and south. Her daughter-in-law, Stella Wallace, lived at No. 2309 on the same side of the same street. Plaintiff's home was one block south of the home of her daughter-in-law. On this particular evening plaintiff and Stella Wallace left the home of the latter and walked south toward the home of plaintiff. Plaintiff walked on the left side of Mrs. Wallace and on the east sidewalk side of the street. She walked close to the building line. The parties were about a foot apart, the daughter-in-law walking on the side next the parkway. Many times before this

41743

IRA ORMAN,

Appellant,

v.

CITY OF CHICAGO,

Appellee.

3131.144

MR. JUSTICE MANTON DELIVERED THE OPINION OF THE COURT.

In an action to recover damages for personal injuries upon trial by jury there was a verdict for plaintiff in the sum of \$2,200 with judgment after motions for a new trial was in error had been overruled. Defendant appeals.

The negligence alleged was that the City with constructive notice permitted a sidewalk to become and be in a dangerous condition, whereby plaintiff fell and was injured. The defendant contends for reversal that it was not guilty of negligence in maintaining the sidewalk and that the evidence does not disclose plaintiff at the time she received her injuries was in the care of one of the cars.

The accident in which plaintiff was injured occurred on the evening of March 15, 1927, about 7 o'clock P.M. Plaintiff lived at 2415 North Albany Avenue in Chicago, a street running north and south. Her daughter-in-law, Stella Wallace, lived at No. 2309 on the west side of the same street. Plaintiff's home was one block south of the home of her daughter-in-law. On this particular evening plaintiff and Stella Wallace left the home of the latter and walked south toward the home of plaintiff. Plaintiff walked on the left side of Mrs. Wallace and on the west sidewalk side of the street. She walked close to the building line. The parties were about a foot apart, the daughter-in-law walking on the side next the building. Many times before this

plaintiff had walked over this same sidewalk. She walked over it about twice a week. Mrs. Wallace, too, was familiar with the sidewalk, having passed over it many times.

There is some conflict in the evidence as to whether the street lights in that block were on the east side of the street. At any rate, the evidence shows it was dark at the time in question.

In the sidewalk in front of No. 2347 there was a difference of level in the adjoining slabs of concrete. This difference in level started on the sidewalk near the building line and grew larger gradually toward the curb. The witnesses did not agree as to the depth of the depression in the sidewalk. One witness said one of the slabs was three inches higher than the other; he said he didn't measure it, it might have been an inch and it might have been less. Another witness said it was about "three or four inches" at the extreme part of the rise and about an inch near to the building line. The higher slab was broken at the corner near the fence. Photographs showing the condition of the sidewalk are in evidence and give a better idea of its condition than the testimony of the witnesses. This defective condition of the sidewalk had existed for six or seven years.

Plaintiff stumbled over this depression, fell on her left arm and broke it. Her daughter-in-law and a Mr. Koscielniak picked her up and took her to her home. From there she was taken to the County Hospital where she stayed five days, and was later treated for about two months making weekly visits to the hospital. She sustained a fracture of the ulna bone in her left arm, and the evidence shows without dispute has sustained permanent injury. There has been a shrinkage or atrophy of the muscles of the forearm.

Plaintiff had walked over this same sidewalk, the witness says it about twice a week. Mr. Wilson, too, had walked over the sidewalk, having passed over it many times.

There is some conflict in the evidence as to whether

the street lights in front of the house on the east side of the street. At any rate, the witness shows it was dark at the time in question.

In the sidewalk in front of No. 1215 there was a difference of level in the adjoining areas of concrete. This difference in level started on the sidewalk near the building line and grew larger gradually toward the curb. The witness did not agree as to the length of the depression in the sidewalk. The witness said one of the alphas was three inches high and the other; he said he didn't remember it, it might have been an inch and it might have been less. Another witness said it was about "three or four inches" at the extreme part of the line and about an inch near to the building line. The witness also was broken at the corner near the fence. Photographs showing the condition of the sidewalk are in evidence and give a better idea of its condition than the testimony of the witnesses. This defective condition of the sidewalk had existed for six or seven years.

Plaintiff stumbled over this depression, fell on her left arm and broke it. Her daughter-in-law and a Mr. Foster picked her up and took her to her home. From there she was taken to the County Hospital where she stayed five days, and was later treated for about two months making weekly visits to the hospital. She sustained a fracture of the left arm in her left arm, and the evidence shows without dispute her sustained permanent injury. There has been a shrinkage or atrophy of the muscles of the fore-

Plaintiff at the time of the trial was 57 years of age. Defendant contends it should have been held by the court, as a matter of law, defendant was not guilty of negligence and that a requested instruction to that effect should have been given. In considering this contention plaintiff is entitled to have the evidence with all its just inferences taken in the light most favorable to her. When so considered, we hold the jury might reasonably find the sidewalk was defective and that defendant had constructive notice thereof and was negligent, while plaintiff at and before the time of her injury was in the exercise of due care. The photographs in evidence show that the defect in the sidewalk was substantial not merely a slight difference in the level of adjoining slabs of concrete, as defendant contends. Any attempt to review the cases (about 60 in number) which are cited in the briefs would require much labor without increasing materially the sum total of judicial knowledge. Graham v. City of Chicago, 346 Ill. 638, cited by defendant, decides the liability of a city for causing the accumulation of artificial ice on its sidewalks. White v. City of Belleville, 284 Ill. App. 322, is a case where the facts were quite similar to those in this case and the decision quite favorable to defendant's view. The Appellate Court was, however, reversed by the Supreme Court in White v. City of Belleville, 364 Ill. 577. The cause was remanded to the Appellate Court with directions to pass on other errors. The Appellate Court then affirmed the judgment, 290 Ill. App. 616. The difficulty in harmonizing cases of this character is described in the opinion of this court in Puck v. City of Chicago, 281 Ill. App. 6. Upon the whole record we hold this case was for the jury and the verdict was not against the manifest weight of the evidence and the judgment will be affirmed.

AFFIRMED.

McSurely, P. J., and O'Connor, J., concur.

Plaintiff at the time of the trial was 37 years of age. Defendant contends it should have been held by the court, as a matter of law, defendant was not guilty of negligence and that a requested instruction to that effect should have been given. In considering this contention plaintiff is entitled to have the evidence with all its just inferences taken in the light most favorable to her, even so considered, we hold the jury might reasonably find the sidewalk was defective and that defendant had constructive notice thereof and was negligent, while plaintiff at and before the time of her injury was in the exercise of due care. The photographs in evidence show that the defect in the sidewalk was substantial not merely a slight difference in the level of adjoining slabs of concrete, as defendant contends. Any attempt to review the case (about 30 in number) which are cited in the brief would require much labor without increasing materially the amount of judicial knowledge. Johnson v. City of Chicago, 232 Ill. 622, cited by defendant, decides the liability of a city for causing the accumulation of artificial ice on its sidewalk. White v. City of Belleville, 232 Ill. 490, 232, is a case where the facts were quite similar to those in this case and the decision quite favorable to defendant's view. The appellate court was, however, reversed by the supreme court in White v. City of Belleville, 234 Ill. 307. The court was reversed to the appellate court with affirmance to leave on other error. The appellate court then affirmed the judgment, 235 Ill. App. 612. The difficulty in harmonizing cases of this character is described in our opinion of this court in Frank v. City of Chicago, 231 Ill. App. 61. Upon the whole record as laid this case was for the jury and the verdict was not against the manifest weight of the evidence and the judgment will be affirmed.

REVEREND.

REVEREND, P. J., AND JUDGES, J., MEMBERS.

41773

P. H. BILLETER,
Appellee,

v.

HALSAM PRODUCTS COMPANY,
Appellant.

APPEAL FROM

MUNICIPAL COURT, OF CHICAGO.

313 I.A. 145

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

In an action for damages for breach of contract, on trial by the court there was a finding for plaintiff in the sum of \$2,337.50. Defendant appeals.

Plaintiff is in the business of selling bagged, bailed and bulk sawdust and shavings. Defendant manufactures checkers and dominoes. July 1, 1937, they entered into a written agreement by which in substance plaintiff agreed for a period of two years to remove all shavings and sawdust from defendant's plant. For the first year of the period defendant agreed to pay plaintiff compensation in the sum of \$40.00 per month in addition to the sawdust, etc. For the second year plaintiff agreed to perform these services without further or other compensation.

Plaintiff at once began work under the terms of the contract. March 23, 1938, defendant wrote plaintiff in substance that the demand for shavings and sawdust had increased very much; that it had two offers to buy its supply of shavings and sawdust at \$1.00 to \$2.00 per load. Defendant said: "Today you are not only getting this \$40.00 a month from us to haul the shavings out, but no doubt are getting quite substantial prices from your customers for the shavings. The combination of the two, therefore, has no doubt paid for your equipment much sooner than you expected. We realize, Mr. Billeter, that you did take care of us last summer when it was almost impossible to get rid of the shavings. However, conditions are so entirely different now than

RECEIVED

In an action for breach of contract, on
 trial by the court there was a finding for Plaintiff in the sum
 of \$2,337.50. Defendant appeals.

Plaintiff is in the business of selling, leasing, and
 and milk machines and related equipment. Defendant manufactures and
 and distributes. July 1, 1977, they entered into a written agreement
 by which in substance Plaintiff agreed for a period of two years
 to remove all machines and related equipment from Defendant's plant. For
 the first year of the period Defendant agreed to pay Plaintiff
 compensation in the sum of \$1,000 per month in addition to the
 salary, etc. For the second year Plaintiff agreed to perform
 these services without further or other compensation.

Plaintiff at once began work under the terms of the
 contract. March 30, 1978, Defendant wrote Plaintiff in substance
 that the demand for machines and related equipment had increased very much;
 that it had two offers to buy the rights of Plaintiff and demand
 at \$1.00 to \$2.00 per foot. Defendant said: "only you are not
 only getting this \$1.00. I would like to have the machines
 out, but we don't see getting quite substantial return from your
 customers for the machines. The compensation of the two, however,
 for, we no longer wish for your equipment and we are not going to
 expect. As a result, Mr. Plaintiff, that you are to be
 no last number when it was agreed previously to get rid of the

they were then that we believe some change in the contract should be submitted by you".

A conversation between plaintiff and Mr. Goss of the defendant company followed in which plaintiff declined to change the contract.

August 8, 1938, defendant again wrote: "We regret to advise that we find it necessary to discontinue the agreement made with you as of July 1, 1937, to haul our shavings and sawdust away". The action of defendant was said to have been caused by the fact that there had been a forced shutting down of the woodworking department "due to the fact that the 'cyclone' was entirely filled up which caused the shavings to fly all over the neighborhood before same was noticed". The letter went on to say that neighbors had complained and the Health Department representative called and warned not to let this happen again. The letter stated arrangements had been made for other service starting the next day.

It is admitted the "cyclone" overflowed and sawdust floated about the neighborhood, but there is a dispute as to who was at fault. Plaintiff says Mr. Goss told him when he first made the contract that defendant produced only two or three loads a day; that usually defendant had someone watching the bin and would call plaintiff up if his truck did not happen to get there when the bin was full. This had been the practice up to March 23, 1938. After that date defendant did not call up plaintiff in such circumstances.

After the letter of August 8, a conference followed at which the union agent, Mr. Goss, Mr. Margraf and plaintiff were present. The result of the conference is expressed in a letter of defendant to plaintiff, dated August 12, 1938. In substance

they were then that he called some names in the contract which
be admitted by him".

A conversation between plaintiff and Mr. Jones of the
defendant company followed in which plaintiff admitted to signing
the contract.

August 8, 1938, defendant again wrote: "In regard to
advice that we find it necessary to discontinue the agreement
made with you as of July 1, 1937, to build our buildings and also
quit away". The action of defendant was said to have been caused
by the fact that there had been a forced entry into one of the
woodworking department "and the fact that the 'cyclone' was
entirely filled up which caused the shavings to fly all over the
neighborhood before some was noticed". The latter went on to
say that neighbors had complained on the health department
representative called and warned not to let this happen again.
The latter stated arrangements had been made for other shavings
starting the next day.

It is admitted the "cyclone" overflowed and shavings
floated about the neighborhood, but there is a dispute as to
who was at fault. Plaintiff says Mr. Jones told him when he first
made the contract that defendant produced only two or three loads
a day; that usually defendant had someone watching the bin and
would call plaintiff up if his truck did not happen to get there
when the bin was full. This had been the practice up to March
23, 1938, after that date defendant did not call up plaintiff
in such circumstances.

After the letter of August 8, a conference followed at
which the union agent, Mr. Jones, Mr. Brown and plaintiff were
present. The result of the conference is expressed in a letter
of defendant to plaintiff, dated August 11, 1938. In substance

it is to the effect that it had been unanimously agreed plaintiff should continue to haul away the shavings and sawdust "as per agreement made with you as of July 1, 1937, with the exception that Charles Margraf is to receive 50% of the white pine shavings produced by us----he to do his own hauling as instructed to do so by you." The letter goes on to state that if through no fault of defendant "you fail to live up to your part of the contract to the extent that our Woodworking Department is shut down due to the blower system being plugged up, we will have the right to cancel said contract".

Plaintiff continued to haul under this modified agreement until August 22. Plaintiff testifies that a few days after August 12, Mr. Goss called him up and asked if he couldn't get some other supply to take the place of defendant's mill; that again (a few days thereafter) plaintiff called Goss and told him he had an opportunity to bid in on a mill that would produce as much as defendant's, that he would go ahead with the negotiations and if successful would release defendant from the contract. He also says he told Goss it might be advisable for him to get in touch with Mr. Margraf to see if Margraf was willing to take the entire output of defendant. Goss called back and said Margraf would do this, and plaintiff said he would see what he could do with his new contract and advise. The new contract, however, which was being negotiated between plaintiff and the St. Joseph Lumber Company, was not consummated. Plaintiff notified Mr. Goss to this effect, but Goss stated that he had already notified Margraf to go ahead.

On September 1, 1938, attorneys for plaintiff wrote defendant notifying it plaintiff was ready to continue to perform the services required by the contract of July 1, 1937, as modified

it is to the effect that it had been previously agreed Plaintiff should continue to haul until the plaintiff had received the agreement made with you as of July 1, 1937, with the provision that Charles H. H. is to receive 50% of the whole price realized produced by us---he to do his own hauling as instructed to do so by you. The letter goes on to state that it through no fault of defendant "you fail to live up to your part of the contract to the extent that our bookkeeping department is now down due to the power system being changed up, we will have the right to cancel said contract".

Plaintiff continued to haul under this contract until August 1, 1937. Plaintiff testified that a few days after August 1, Mr. Goss called him up and asked if he couldn't get some other supply to take the place of defendant's mill; that again (a few days thereafter) Plaintiff called Goss and told him he had an opportunity to bid in on a mill that would produce as much as defendant's, that he would go ahead with the negotiations and if successful would release defendant from his contract. He also says he told Goss it might be advisable for him to get in touch with Mr. Hargrett to see if Hargrett was willing to take the entire output of defendant. Goss called back and said Hargrett would do this, and Plaintiff said he would see what he could do with his new contract and advice. The new contract, however, which was being negotiated between Plaintiff and Mr. Hargrett, Plaintiff testified, was not consummated. Plaintiff testified that he had always notified to this effect, but now states that he had always notified Hargrett to do so.

On September 1, 1937, Hargrett for Plaintiff wrote defendant notifying it Plaintiff was ready to continue its contract the services required by the contract of July 1, 1937, as modified

by the agreement set forth in the letter of August 12, 1938, and that demand was made he be allowed to continue such services until the end of the contract. Further that in default of this defendant would be held responsible for damages.

On September 7, defendant wrote plaintiff: "Pursuant to our telephone conversation yesterday afternoon, it is our understanding now that you could pay us something for our white shavings. In order to be in a better position to make a definite decision in the matter, wish you would submit your proposal in writing. Upon receipt of same, we will go into the matter again".

Defendant argues first the contract was abandoned by plaintiff and acquiesced in by defendant: that the contract will, therefore, be deemed to have been abandoned by both.

Secondly plaintiff is precluded from recovering because it was he who first breached the contract. To the first proposition defendant cites Harrison v. Polar Star Lodge No. 652, 116 Ill. 279; Lasher v. Loeffler, 190 Ill. 150; and Hayes v. Carey, 287 Ill. 274. To the second it cites Myers v. Tillson, 149 Ill. App. 628; Reskie, Kirshbaum & Co. v. Walzer, 213 Ill. App. 305; Consumers Mutual Oil Co. v. Western Petroleum Co., 216 Ill. App. 382, and similar cases. Both propositions of law may be conceded to be accurate in a case where the facts are such as to make them applicable. Defendant's arguments on these points disregard the contention of the plaintiff (well established) that where a case is tried by the court without a jury the findings of the court as to the facts have the same weight as the verdict of a jury upon review by this court. Many cases so hold. We cite only Alton Banking & Trust Co. v. Alton Bldg. & Loan Ass'n., 289 Ill. App. 177. Defendant cannot prevail as to these points on this record because we must assume as a matter of fact, under the

by the present and forth in the letter of August 1, 1935, and that defendant was made to be allowed to continue such services until the end of the contract. Further that in violation of this defendant would be held responsible for damages.

On September 7, defendant wrote plaintiff: "I regret

to our telephone conversation yesterday afternoon, it is my understanding now that you could pay us something for our hair shavings. In order to be in a better position to make a definite decision in the matter, which you would submit your proposal in writing. Upon receipt of same, we will go into the matter again."

Defendant argues first the contract was abandoned by plaintiff and acknowledged in by defendant: that the contract was, therefore, he deemed to have been abandoned by both.

Secondly plaintiff is precluded from recovering because it was he who first breached the contract. To the first proposition defendant cites Harmon v. John Star Line Co., 100 Ill. 270; Lester v. Loebler, 100 Ill. 100; and Jones v. Jones, 100 Ill. 274. To the second it cites Wynn v. Wynn, 100 Ill. App. 622; Fidelity Investment Co. v. Fidelity, 100 Ill. App. 200; Commercial Trust Co. v. Commercial Trust Co., 100 Ill. 200, and similar cases. Both propositions of law may be considered to be accurate in a case where the facts are such as to make them applicable. Defendant's arguments on these points (allegedly) are contention of the plaintiff (well established) that where a case is tried by the court without a jury the findings of the court as to the facts have the same weight as the verdict of a jury upon review by this court. Many cases are cited. In only one, Allen v. Allen & Trust Co. v. Allen & Trust Co., 100 Ill. 177, defendant cannot prevail as to these points on this record because he must assume as a matter of fact, under the

findings of the court, the parties did not abandon the contract and that plaintiff was not first guilty of a breach of it.

Defendant next contends the court erred in allowing plaintiff to testify as to the number of bails, bags and loads of sawdust, etc., he received from defendant without producing specific records which would be the best evidence. Defendant, we think, misapprehends the record on this point. Upon his direct examination plaintiff testified he had kept no record of these particular matters for the reason he did not pay for the material. In his bookkeeping he simply kept records of sales and costs. On cross-examination he was asked if he kept any books, who kept them and where the books were. He replied that he did keep books, that they were kept by his wife and were in the hands of attorneys for the reorganized company known as the A. A. A. Sawdust and Shavings Company. He did not know exactly where. We understand from this evidence not that there were no books showing the business transacted by the plaintiff but that there were no books which would show the particular transactions as to the numbers of loads, etc., which at different times plaintiff received from defendant's plant. If defendant desired to show there were books kept in the course of plaintiff's business, which would contradict plaintiff's testimony, the process of the court was available to compel the production of such books. Counsel for defendant asked no specific questions as to records of particular transactions and (it is suggested by plaintiff) was careful not to do so. At any rate, we hold there is no reversible error in this respect.

Defendant also contends that the damages allowed were merely prospective profits (speculative and uncertain) which under the law a suitor is not allowed to recover. Among other

findings of the court, the plaintiff did not submit the evidence
and that plaintiff was not first guilty of a breach of it.
Defendant next contends the court erred in allowing
plaintiff to testify as to the number of bills, coins and checks
of receipt, etc., as received from defendant at bank producing
specific records which would be the best evidence. Defendant,
we think, misapprehends the record on this point. Upon his
direct examination plaintiff testified he had kept no record of
these particular matters for the reason he did not say for the
material. In his bookkeeping he simply kept records of sales
and costs. On cross-examination he was asked if he kept any
books, who kept them and where the books were. He replied that
he did keep books, that they were kept by his wife and were in
the hands of attorney for the defendant's company known as the
A. A. Ward and Davison Company. He did not know exactly
where, as understood from the evidence not that there were no
books showing the business transacted by the plaintiff but that
there were no books which would show the particular transactions
as to the number of loads, etc., which at different times plain-
tiff received from defendant's plant. If defendant failed to
show there were books kept in the course of plaintiff's business,
which would contradict plaintiff's testimony, the record of the
court was available to impeach the production of such books.
Counsel for defendant asked an explicit question as to receipt
of particular transactions and (it is suggested by plaintiff)
was careful not to do so. At any rate, we hold there is no
reversible error in this record.

Defendant also contends that the damages allowed were
excessively prospective (speculative) and (it is suggested by plaintiff)
under the law a trial is not allowed to recover, being that

cases defendant cites National Candy Co. v. Nichols Candy Co., 155 Ill. App. 44; M. Hommel Wine Co. v. Netter, 197 Ill. App. 382, and Salaban v. East St. Louis and Interurban Water Co., 284 Ill. App. 358. The National Candy Company case is annotated in 88 A. L. R. 1471. The annotation discloses there has been some conflict in the opinions of the Appellate Courts of this state as to the rule applicable in such cases. The rule now controlling was announced by the Supreme Court in the case of Barnett v. Caldwell Furniture Co., 277 Ill. 286. In that case the court said: (p. 289)

"A recovery may be had for prospective profits when there are any criteria by which the probable profits can be estimated with reasonable certainty. **** It is perhaps true that absolute certainty as to the amount of loss or damage in such cases is unattainable, but that is not required to justify a recovery. All the law requires is that it be approximated by competent proof. That proof of the exact amount of loss is impossible will not justify refusing compensation. If that were the law, contracts of the kind here involved could be violated with impunity. All the law requires in cases of this character is that the evidence shall with a fair degree of probability tend to establish a basis for the assessment of damages."

In Crichfield v. Julia, 147 Fed. 65, the opinion states that the rule against the recovery of uncertain damages has been generally directed against uncertainty as to cause rather than uncertainty as to measure or extent, and that uncertainty as to cause will usually prevent recovery, whereas uncertainty as to measure or extent does not. See also Black Diamond Fuel Co. v. The Illinois Phosphate Co., 219 Ill. App. 150, and Dahlin v. The Maytag Co., 238 Ill. App. 85.

The defendant in its reply brief undertakes to distinguish this from the Barnett case on the facts. It says that the con-

DeWitt v. Goldstein, 377 Ill. 502. In that case controlling was announced by the Supreme Court in the case of state as to the rate applicable in that case. The ruling some conflict in the opinions of the majority of the Court of this in 88 U. S. 1471. The application of the law has been 384 Ill. App. 502. The National Bank of Commerce is involved in 380, and 381 v. 382. 383, and 384 v. 385. 386, and 387 v. 388. 389, and 390 v. 391. 392, and 393 v. 394. 395, and 396 v. 397. 398, and 399 v. 400. 401, and 402 v. 403. 404, and 405 v. 406. 407, and 408 v. 409. 410, and 411 v. 412. 413, and 414 v. 415. 416, and 417 v. 418. 419, and 420 v. 421. 422, and 423 v. 424. 425, and 426 v. 427. 428, and 429 v. 430. 431, and 432 v. 433. 434, and 435 v. 436. 437, and 438 v. 439. 440, and 441 v. 442. 443, and 444 v. 445. 446, and 447 v. 448. 449, and 450 v. 451. 452, and 453 v. 454. 455, and 456 v. 457. 458, and 459 v. 460. 461, and 462 v. 463. 464, and 465 v. 466. 467, and 468 v. 469. 470, and 471 v. 472. 473, and 474 v. 475. 476, and 477 v. 478. 479, and 480 v. 481. 482, and 483 v. 484. 485, and 486 v. 487. 488, and 489 v. 490. 491, and 492 v. 493. 494, and 495 v. 496. 497, and 498 v. 499. 500, and 501 v. 502. 503, and 504 v. 505. 506, and 507 v. 508. 509, and 510 v. 511. 512, and 513 v. 514. 515, and 516 v. 517. 518, and 519 v. 520. 521, and 522 v. 523. 524, and 525 v. 526. 527, and 528 v. 529. 530, and 531 v. 532. 533, and 534 v. 535. 536, and 537 v. 538. 539, and 540 v. 541. 542, and 543 v. 544. 545, and 546 v. 547. 548, and 549 v. 550. 551, and 552 v. 553. 554, and 555 v. 556. 557, and 558 v. 559. 560, and 561 v. 562. 563, and 564 v. 565. 566, and 567 v. 568. 569, and 570 v. 571. 572, and 573 v. 574. 575, and 576 v. 577. 578, and 579 v. 580. 581, and 582 v. 583. 584, and 585 v. 586. 587, and 588 v. 589. 590, and 591 v. 592. 593, and 594 v. 595. 596, and 597 v. 598. 599, and 600 v. 601. 602, and 603 v. 604. 605, and 606 v. 607. 608, and 609 v. 610. 611, and 612 v. 613. 614, and 615 v. 616. 617, and 618 v. 619. 620, and 621 v. 622. 623, and 624 v. 625. 626, and 627 v. 628. 629, and 630 v. 631. 632, and 633 v. 634. 635, and 636 v. 637. 638, and 639 v. 640. 641, and 642 v. 643. 644, and 645 v. 646. 647, and 648 v. 649. 650, and 651 v. 652. 653, and 654 v. 655. 656, and 657 v. 658. 659, and 660 v. 661. 662, and 663 v. 664. 665, and 666 v. 667. 668, and 669 v. 670. 671, and 672 v. 673. 674, and 675 v. 676. 677, and 678 v. 679. 680, and 681 v. 682. 683, and 684 v. 685. 686, and 687 v. 688. 689, and 690 v. 691. 692, and 693 v. 694. 695, and 696 v. 697. 698, and 699 v. 700. 701, and 702 v. 703. 704, and 705 v. 706. 707, and 708 v. 709. 710, and 711 v. 712. 713, and 714 v. 715. 716, and 717 v. 718. 719, and 720 v. 721. 722, and 723 v. 724. 725, and 726 v. 727. 728, and 729 v. 730. 731, and 732 v. 733. 734, and 735 v. 736. 737, and 738 v. 739. 740, and 741 v. 742. 743, and 744 v. 745. 746, and 747 v. 748. 749, and 750 v. 751. 752, and 753 v. 754. 755, and 756 v. 757. 758, and 759 v. 760. 761, and 762 v. 763. 764, and 765 v. 766. 767, and 768 v. 769. 770, and 771 v. 772. 773, and 774 v. 775. 776, and 777 v. 778. 779, and 780 v. 781. 782, and 783 v. 784. 785, and 786 v. 787. 788, and 789 v. 790. 791, and 792 v. 793. 794, and 795 v. 796. 797, and 798 v. 799. 800, and 801 v. 802. 803, and 804 v. 805. 806, and 807 v. 808. 809, and 810 v. 811. 812, and 813 v. 814. 815, and 816 v. 817. 818, and 819 v. 820. 821, and 822 v. 823. 824, and 825 v. 826. 827, and 828 v. 829. 830, and 831 v. 832. 833, and 834 v. 835. 836, and 837 v. 838. 839, and 840 v. 841. 842, and 843 v. 844. 845, and 846 v. 847. 848, and 849 v. 850. 851, and 852 v. 853. 854, and 855 v. 856. 857, and 858 v. 859. 860, and 861 v. 862. 863, and 864 v. 865. 866, and 867 v. 868. 869, and 870 v. 871. 872, and 873 v. 874. 875, and 876 v. 877. 878, and 879 v. 880. 881, and 882 v. 883. 884, and 885 v. 886. 887, and 888 v. 889. 890, and 891 v. 892. 893, and 894 v. 895. 896, and 897 v. 898. 899, and 900 v. 901. 902, and 903 v. 904. 905, and 906 v. 907. 908, and 909 v. 910. 911, and 912 v. 913. 914, and 915 v. 916. 917, and 918 v. 919. 920, and 921 v. 922. 923, and 924 v. 925. 926, and 927 v. 928. 929, and 930 v. 931. 932, and 933 v. 934. 935, and 936 v. 937. 938, and 939 v. 940. 941, and 942 v. 943. 944, and 945 v. 946. 947, and 948 v. 949. 950, and 951 v. 952. 953, and 954 v. 955. 956, and 957 v. 958. 959, and 960 v. 961. 962, and 963 v. 964. 965, and 966 v. 967. 968, and 969 v. 970. 971, and 972 v. 973. 974, and 975 v. 976. 977, and 978 v. 979. 980, and 981 v. 982. 983, and 984 v. 985. 986, and 987 v. 988. 989, and 990 v. 991. 992, and 993 v. 994. 995, and 996 v. 997. 998, and 999 v. 1000. 1001, and 1002 v. 1003. 1004, and 1005 v. 1006. 1007, and 1008 v. 1009. 1010, and 1011 v. 1012. 1013, and 1014 v. 1015. 1016, and 1017 v. 1018. 1019, and 1020 v. 1021. 1022, and 1023 v. 1024. 1025, and 1026 v. 1027. 1028, and 1029 v. 1030. 1031, and 1032 v. 1033. 1034, and 1035 v. 1036. 1037, and 1038 v. 1039. 1040, and 1041 v. 1042. 1043, and 1044 v. 1045. 1046, and 1047 v. 1048. 1049, and 1050 v. 1051. 1052, and 1053 v. 1054. 1055, and 1056 v. 1057. 1058, and 1059 v. 1060. 1061, and 1062 v. 1063. 1064, and 1065 v. 1066. 1067, and 1068 v. 1069. 1070, and 1071 v.

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tract there was an employment contract; that there is in fact no basis or criteria in this case on which to assess damages. The gist of the holding in the Barnett case was that prospective profits might be recovered in any case where there was criteria by which such profits could be estimated with reasonable certainty. We hold there was such evidence in this case. The contract of plaintiff, as a matter of fact, was in the nature of an employment contract. Plaintiff was to take care of the entire output of defendant's plant. This precise job was turned over to Margraf after plaintiff was wrongfully discharged. There was proof of the amount of material which plaintiff would have received had he been permitted to complete his contract. There was proof of the amount he received the previous year and that plaintiff had customers who would take the material, as defendant well knew. Plaintiff also proved the cost of the sawdust bagged and bailed to him and the price he would have received for it. This was sufficient.

Defendant also urges the proposition (citing authorities) that there was cast upon the plaintiff the duty, in so far as lay in his power, to mitigate the damages which he did not do. It says that while plaintiff was not able to deliver sawdust to customers, he made no effort to obtain another mill as a source of supply, which would have reduced his damages; that he merely sat idly by and watched the so called damages accumulate. Defendant cites Dobbins v. Duquid, 65 Ill. 464; North Packing & Provision Company v. Western Union Telegraph Co., 70 Ill. App. 275; C. R. & I. C. Ry. Co. v. Sprague Electric Co., 280 Ill. 386; and Salaban v. East St. Louis & Interurban Water Co., 284 Ill. App. 358, to the effect that under such circumstances the plaintiff cannot recover to the extent he might have prevented damage or

that there was an employment contract; that fact is in fact no basis or criteria in this case on which to base a decision. The fact of the hiring in the instant case was that prospective profits might be recovered in any case - and that was the only basis by which such profits could be estimated with reasonable certainty. We hold there was such evidence in this case. The contract of plaintiff, as a matter of fact, was in the nature of an employment contract. Plaintiff was to take care of the entire output of defendant's plant. This precise job was turned over to plaintiff after plaintiff was wrongfully discharged. There was proof of the amount of material which plaintiff would have received had he been permitted to complete his contract. There was proof of the amount he received the previous year and that plaintiff had one-tenth as much as he would have received had he completed his contract. Plaintiff also proved the cost of the material he used and the price he would have received for it. This was sufficient.

Defendant also urges the proposition (which is untenable) that there was cost upon the plaintiff's duty, in so far as lay in his power, to mitigate the damages which he did not do. It says that while plaintiff was not able to deliver material to customers, he made no effort to obtain another order or a contract of supply, which would have reduced his damages; that he merely sat idly by and watched the loss accumulate. Defendant cites other cases v. Smith, 52 Ill. 2d 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

injury. Again the facts and the finding of the court thereon are against defendant. The contention cannot be sustained. The whole evidence shows defendant was trying to get out of its contract.

We find no reversible error in the record, and the judgment will be affirmed.

AFFIRMED.

McSurely, P. J., and O'Connor, J., concur.

whole evidence about defendant was tried to get out of the
the instant defendant. The confession cannot be admitted. The
injury. Again the State has the burden of a more serious

...the finding no reversible error in the record, and the judgment will be affirmed.

Security, 9. 1., and 10. 1.

41798

GEORGE KELCH,
Appellant,

v.

JOSEPH MARX, doing business as
CHICAGO WELDING & BOILER REPAIR
COMPANY, and GEORGE GIEB,
Appellees.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

313 I.A. 146

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

Kelch, plaintiff in the trial court, appeals from a judgment entered on the verdict of a jury directed by the court at the close of plaintiff's evidence in a suit to recover damages for personal injuries. It is argued for reversal the court erred in directing the verdict and entering judgment.

The evidence is not conflicting. September 14, 1939, while plaintiff walked north on Clybourn Avenue, a public highway extending in a northwesterly and southeasterly direction, near No. 2449 on the east side of the street, an automobile owned by Joseph Marx and driven by his employee, George Gieb, struck and severely injured plaintiff. The evidence discloses plaintiff at the time of his injury was in the exercise of due care.

Plaintiff testified that he was walking on the inside of the sidewalk on the building line, opposite a vacant lot; was about half way across the vacant lot when he heard a noise behind him and turning around saw an automobile coming. There were two men in the automobile. It was too late to get out of the way. He was hit by the car owned by Marx and driven by Gieb and knocked into the vacant lot. Plaintiff says the car was right on top of him when he first saw it going north on his side of the street. After he was struck he noticed the car that struck him was facing due south and was clear across the sidewalk. The

WILLIAM J. ...
CHICAGO, ILL.

v.

JOHN ...
CHICAGO, ILL.

MR. JUSTICE ...

Kelch, plaintiff in the trial court, appeals from a judgment entered on the verdict of a jury directed by the court at the close of plaintiff's evidence in a suit to recover damages for personal injuries. It is argued for reversal the court erred in directing the verdict and entering judgment.

The evidence is not conflicting. September 12, 1935, while plaintiff walked north on Clybourn Avenue, a public highway extending in a northwesterly and southeasterly direction, near No. 1443 on the east side of the street, an automobile owned by Joseph Marx and driven by his employee, Dennis Gish, struck and severely injured plaintiff. The evidence discloses plaintiff at the time of his injury was in the exercise of due care.

Plaintiff testified that he was walking on the inside of the sidewalk on the building line, opposite a vacant lot; was about half way across the vacant lot when he heard a noise behind him and turning around saw an automobile coming. There were two men in the automobile. It was too late to get out of the way. He was hit by the car owned by Marx and driven by Gish and knocked into the vacant lot. Plaintiff says the car was right on top of him when he first saw it going north on the side of the street. After he was struck he noticed the car that struck him was facing the south and was almost straight on sideways. The

curb at that place was about a foot high.

Gieb testified (and the testimony is not contradicted) that the accident happened at about 7:45 A.M. He lived at 3711 North Damen Avenue and is a boiler maker. The weather was clear, the streets dry. Marcus Maurer was riding with him. They were going to work on a job at 3734 California Avenue. From their place of business they went northwest on Clybourn Avenue. He was driving between the northbound rails and the east curb. On the opposite side of the street there was a heavy traffic of passenger cars going south along Clybourn Avenue, some on the opposite side of the street car tracks, some in the tracks. He was on the right side of the track and heard a crash. He looked over and saw a car pulled over to the west curb, hit the curb. He was then about even with the car and pulled to the side. The car on the west side of the street turned around rapidly, came across the street and hit the middle of his car, throwing him over on the sidewalk about 4 feet. The Gieb car turned around until it was facing south. The right front of the other car struck the left side of the Gieb car between the rear door and the rear end with its right fender. The car that hit the Gieb car hit the curb over the west side of Clybourn Avenue just in front of a parked car. When the Gieb car stopped no part of it was on the sidewalk. It was in the empty lot and against a building. At the time of the collision Gieb lost control of his car. He went over to plaintiff and found he was hurt. That was the first time he had seen him. The police came. Gieb gave them a statement in substance stating the same facts to which he testified. It was an Oldsmobile car belonging to a Mr. Reuter that struck Gieb's car, in turn causing Gieb to lose control and his car to strike and injure plaintiff.

car at that place was about a foot high.

(Glad testified) and the testimony is not contradicted.

that the accident happened at about 7:45 A.M. He lived at 3711 North Damen Avenue and is a boiler maker. The weather was clear, the streets dry. He was working on Glyndon Avenue. They were going to work on a job at 1724 California Avenue. From their place of business they went northwest on Glyndon Avenue. He was driving between the northbound lane and the east curb. On the opposite side of the street there was a heavy traffic of passenger cars going south along Glyndon Avenue, some on the opposite side of the street car tracks, some in the tracks. He was on the right side of the track and heard a crash. He looked over and saw a car pulled over to the east curb, hit the curb. He was then about even with the car and pulled to the side. The car on the west side of the street turned around rapidly, came across the street and hit the middle of his car, throwing him over on the sidewalk about 4 feet. The Glad car turned around until it was facing south. The right front of the other car struck the left side of the Glad car between the rear door and the rear end with its right fender. The car that hit the Glad car hit the curb over the east side of Glyndon Avenue just in front of a parked car. When the Glad car stopped no part of it was on the sidewalk. It was in the empty lot and against a building. At the time of the collision Glad lost control of his car. He went over to plaintiff and landed on his head. That was the first time he had seen him. The police came. He was taken to a statement in substance stating the same facts as stated in testimony. It was an affidavit and belonged to a St. Paul police officer. Glad testified that he was driving Glad to some control and hit car to strike and injure plaintiff.

The ground of defendant's motion for an instruction in his favor was that there was no evidence tending to show negligence on his part, and the motion was, we think, properly sustained. Plaintiff cites cases as to presumptions, etc., but these never take the place of proved facts. When evidence is produced contrary to a presumption the presumption disappears. Lohr v. Barkmann Cartage Company, 335 Ill. 335, 340. The evidence here shows that this unfortunate accident was due to a cause entirely beyond the control of defendant Gieb, namely, the presence of a superior force or tortuous act of a stranger tending to bring about the accident. Under such facts no prima facie case was made out. The evidence all showed affirmatively defendant was not guilty of negligence. Chicago City Railway Co. v. Rood, 163 Ill. 477. As a matter of fact, the record shows Reuter, (owner of the automobile which was the real cause of the accident) was sued by plaintiff and settled for \$1,000. The instruction of a verdict in defendant's favor was properly given. The judgment will be affirmed.

AFFIRMED.

McSurely, P. J., and O'Connor, J., concur.

41739

RALPH H. JACKSON,
Appellee, }

v. }

MEYER KATZMAN, et al.,
Appellants. }

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

313 I.A. 146²

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Ralph H. Jackson brought an action against Meyer Katzman, Solomon E. Harrison, Danville Plaza Co., a corporation, Edward Paulson, C. Kildow Lovejoy and Claude A. Lovejoy to recover a commission of \$2,560.50, claimed to have been earned by him as a real estate broker in obtaining a tenant for the hotel in Danville, Illinois. The suit was dismissed as to Paulson and the two Lovejoys, the latter two apparently not having been served with process. There was a hearing before the court without a jury, a finding and judgment in plaintiff's favor for the amount of his claim against Katzman, Harrison and the Danville Plaza Company, and they appeal.

The defense interposed was that defendant Paulson, a broker, procured the tenant for the hotel and that he was paid for his services.

The record discloses that in January, 1939, defendants Katzman and Harrison listed the hotel in Danville with plaintiff, a Chicago real estate broker, for the purpose of obtaining a tenant. There is evidence to the effect that defendants wanted a deposit of \$7,500 for the last six months' rent which was to be \$1,250 a month. Defendants desired a 15 year lease but it was agreed they would consult each other as to the final terms. In case plaintiff secured a tenant he was to be paid a broker's commission, the amount of which was agreed upon. He advertised the hotel for rent and succeeded in getting in touch with defend-

RALPH H. JACKSON,
 Plaintiff,
 v.
 MARY KATZMAN, et al.,
 Defendants.

CIRCUIT COURT,
 DEPT. COURT.

21314.146

MR. JUSTICE O'CONNOR delivered the opinion of the court.

Ralph H. Jackson brought an action against Mary Katzman, Solomon L. Harrison, Danville Place Co., a corporation, Edward Paulson, C. Eldon Lovejoy and Claude A. Lovejoy to recover a commission of \$2,500.00, claimed to have been earned by him as a real estate broker in obtaining a tenant for the hotel in Danville, Illinois. The suit was dismissed as to Paulson and the two Lovejoys, the latter two apparently not having been served with process. There was a hearing before the court without a jury, a finding and judgment in plaintiff's favor for the amount of his claim against Katzman, Harrison and the Danville Place Company, and they appeal.

The defense interposed was that defendant Paulson, a broker, procured the tenant for the hotel and that he was paid for his services.

The record discloses that in January, 1936, defendant Katzman and Harrison listed the hotel in Danville with plaintiff, a Chicago real estate broker, for the purpose of obtaining a tenant. There is evidence to the effect that defendant wanted a deposit of \$7,500 for the last six months' rent which was to be \$1,500 a month. Defendant desired a 15 year lease but it was agreed they would consult each other as to the final terms. In case plaintiff secured a tenant he was to be paid a broker's commission, the amount of which was agreed upon. He advertised the hotel for rent and succeeded in getting in touch with several

ant C. Kildow Lovejoy and later with the latter's father, Claude A. Lovejoy. Negotiations were carried on for some time but the parties did not reach any agreement. During the negotiations Katzman and Harrison got in touch with Edward Paulson, another Chicago real estate broker, and submitted the renting of the hotel to him. He also contacted the Lovejoys, as he testified, between April 25 and May 1, of 1939. He told Katzman and Harrison he had a prospective tenant but would not give them his name and afterward an agreement was reached between Katzman and Harrison on one side, and Paulson on the other, as to the terms of the lease. A written lease was prepared dated June 1, 1939, between Katzman and Harrison, as lessors, and Paulson as lessee. The term was for a period of 10 years commencing July 1, 1939 and ending June 30, 1949, at a total rental of \$143,400, payable in monthly installments of \$1,150 for the first 12 months and \$1,200 for the balance of the term. In addition to the rent Paulson was to pay a sum equal to 25% of the gross income derived from the hotel in excess of \$50,000 per year. The lease recites that contemporaneously with the execution of it, \$4,800 was deposited with the lessors as security for the faithful performance by the lessee of the covenants and agreements to be performed on his part, etc. There was a further provision that the lessee might assign the lease or any interest therein "without in each case the consent in writing of the Lessors first had and obtained." The lease further provided: "It is understood and agreed by the parties hereto that upon the assignment of this lease by Edward Paulson and a written acceptance of the assignment by the assignee, the personal liability of Edward Paulson will thereupon cease and determine."

There is a printed assignment attached to the lease dated June 13, 1939, executed by Paulson assigning all his right, title

and C. Kilow Lovejoy and later with the latter's father, Edward A. Lovejoy. Negotiations were carried on for some time but the parties did not reach any agreement. During the negotiations Katman and Harrison got in touch with several tenants, another Chicago real estate broker, and submitted the renting of the hotel to him. He also contacted the Lovejoy's, who he testified, between April 26 and May 1, of 1932. He told Katman and Harrison he had a prospective tenant but would not give them his name and afterward an agreement was reached between Katman and Harrison on one side, and Paulson on the other, as to the terms of the lease. A written lease was prepared dated June 1, 1932, between Katman and Harrison, as lessors, and Paulson as lessee. The term was for a period of 10 years commencing July 1, 1932 and ending June 30, 1942, at a total rental of \$144,000, payable in monthly installments of \$1,200 for the first 12 months and \$1,200 for the balance of the term. In addition to the rent Paulson was to pay a sum equal to 1% of the gross income derived from the hotel in excess of \$25,000 per year. The lease further provided that contemporaneously with the execution of it, \$25,000 was deposited with the lessors as security for the faithful performance by the lessee of the covenants and agreements to be performed on his part, etc. There was a further provision that the lessee might assign the lease on any interest therein "without in any way the consent in writing of the lessors first and obtained." The lease further provided: "It is understood and agreed by the parties hereto that upon the assignment of this lease by lessee, Paulson and a written acceptance of the assignment by the lessors, the personal liability of Edward A. Kilow and all persons therein and therein."

There is a printed assignment attached to the lease dated June 15, 1932, executed by Paulson assigning all his right, title

and interest in the lease to C. Kildow Lovejoy, an acceptance by the assignee, Lovejoy, executed on the same date, and a consent to the assignment executed by Katzman and Harrison dated June 14, 1939.

Paulson testified that prior to the time the lease was signed by Harrison and Katzman he did not disclose Lovejoy's name as being the tenant he had obtained. On cross-examination he testified, "After Harrison signed that lease, he then asked me, 'Who is my lessee going to be?' And I told him, 'Why do you ask that? I have found the lessee.'" This occurred about 10 to 20 minutes after the lease was signed. "Q. Had Mr. Harrison and Mr. Katzman any time prior to the signing of that lease on Page 10 asked you to disclose who your party was? A. No, with the exception that Mr. Harrison wanted to know if it was a responsible tenant, a man in the hotel business now. I assured him that this tenant would be a responsible party. Q. But he did not ask you his name? A. No, I would not tell him if he did. Q. He did not ask you where he was located in business, or any of his references, or anything like that? A. No. We had an understanding that the tenant's name would not be disclosed to Mr. Harrison and Mr. Katzman." That at the time the witness turned the check over to Katzman and Harrison before they turned the lease over to the witness; "they would have the right and privilege, if the tenant was not satisfactory to them, not to turn the lease over." That Katzman and Harrison would have the right to determine whether they would accept the assignee of the lease before the lease was turned over to Paulson but not afterward.

The evidence is further to the effect that defendants paid Paulson \$2,000 in purchase money notes and not in cash for

and interest in the lease for C. William Lovelock, an assignee of the assignee, Lovelock, executed on the same date, and a warrant to the assignment executed by Lovelock and Harrison dated June 14, 1939.

Paulson testified that prior to the time the lease was signed by Harrison and Lovelock he did not know Lovelock's name as being the tenant he had obtained. On cross-examination he testified, "After Harrison signed that lease, he then asked me, 'Who is my lessee going to be?' And I told him, 'Why do you ask that? I have found the lessee.' This happened about 15 to 20 minutes after the lease was signed. And Mr. Harrison and Mr. Katzman any time prior to the signing of that lease on Page 10 asked you to disclose who your party was? A. Yes, with the exception that Mr. Harrison wanted to know if it was a responsible tenant, a man in the hotel business now. I wanted him that this tenant would be a responsible party. But he did not ask you his name? A. No, I would not tell him if he did. Q. He did not ask you where he was located in business, or any of his references, or anything like that? A. No, he did not understand that the tenant's name would not be disclosed to Mr. Harrison and Mr. Katzman. That at the time the witness turned the check over to Harrison and Harrison before they turned the lease over to the witness; "they would have the right and privilege, if the tenant was not satisfactory to them, not to turn the lease over." That Harrison and Harrison would have the right to determine whether they would accept the assignee of the lease before the lease was turned over to Paulson but not otherwise.

The witness is further in the street that Harrison told Paulson \$2,000 in business money would not be cash for

his commission while if they had paid plaintiff he would have been entitled to \$2,560.50.

There is a great deal of other evidence in the record as to what the plaintiff Jackson did towards securing Lovejoy as a tenant for the hotel and there is also evidence tending to show what Paulson did in negotiating the deal with Lovejoy, but we think it would serve no purpose to discuss it further for we are of opinion the court was justified in holding that plaintiff was the procuring cause in obtaining the tenant and not Paulson, as the defendants contend.

The judge in deciding the case said: "As in cases of this kind, particularly a close case such as this seemed to be from the Court's point of view, ****. The Court is of the opinion that there was no abandonment by the ultimate purchaser, C. Kildow Lovejoy.***

"The Court was not impressed by the testimony of the Defendant Katzman. Katzman appeared to be unimpressive, evasive, and possessed of a conveniently forgetful memory.

"There is no doubt in the Court's mind that the energy and enthusiasm of the Witness Paulson, contributed much towards collusion on the part of the defendants. Paulson by his high-pressure methods involved the defendants in a transaction with Lovejoy, which was ultimately completed, to the detriment of the Plaintiff Jackson. No criticism is intended of the Defendant Harrison, an attorney, who was evidently swayed by these high-pressure methods instituted and employed by the Witness Paulson, but the Court is of the opinion that collusion took place and that as such defeated and prevented the Plaintiff Jackson from ultimately completing the negotiations with C. Kildow Lovejoy," and found for the plaintiff.

It seems incredible that Katzman and Harrison would

his commission while it they had paid plaintiff he would have been entitled to \$2,500.00.

There is a great deal of other evidence in the record

as to what the plaintiff Jackson did towards commission money as a tenant for the hotel and there is also evidence tending to show what Paulson did in negotiating the deal with Lovejoy, and we think it would serve no purpose to discuss it further for we are of opinion the court was justified in holding that plaintiff was the procuring cause in obtaining the tenant and not Paulson, as the defendant contends.

The judge in reaching the case said: "In the case of

this kind, particularly a close case such as this, it is to be

from the Court's point of view, *** The Court is of the

opinion that there was no abandonment by the plaintiff, however,

G. Kildow Lovejoy, ***

"The Court was not impressed by the testimony of the

Defendant Jackson. Jackson appeared to be unimpressive, evasive,

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"There is no doubt in the Court's mind that the anxiety

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Plaintiff Jackson. No criticism is intended of the defendant

Harrison, an attorney, who was evidently swayed by these high-

pressure methods instituted and employed by the witness Paulson,

but the Court is of the opinion that collusion took place and

that as such defected and prevented the Plaintiff Jackson from

ultimately completing the negotiation with G. Kildow Lovejoy,"

and found for the plaintiff.

It seems incredible that Jackson and Harrison would

agree with Paulson to make a lease to him covering a period of 10 years and prior to the execution of the lease agree that it should be immediately assigned over to a tenant of whom they had never heard.

Counsel for defendants further contend there is no basis in the record on which the judgment against the Danville Plaza Company can be sustained and say that after the Plaza Company was organized it secured a contract to purchase the hotel from Valkenburg & Company from which company Katzman had a lease dated March 11, 1938, the lease having been procured by Paulson; that the Plaza Company operated the hotel not as a lessee but as an operating company, that it had nothing to do with the lease to Lovejoy; that the lease on the property was owned by Katzman and Harrison in their individual capacities and "When they made the deal with Lovejoy through Paulson, it amounted to a subletting of the hotel." That "inasmuch as the Danville Plaza Company was not and could not be party to the lease *** there is no basis on which liability can be imposed on it for the acts of its principal stockholders in their separate and individual capacities."

Katzman, called as an adverse witness under the Statute, testified that he was president and director of the Danville Plaza Company; that Harrison was the secretary; that the directors were Katzman and wife, and Harrison and wife, and it is admitted that Katzman and Harrison are the principal stockholders.

Harrison testified that he had a 50% interest in the hotel company, which was organized April 26, 1938. It was stipulated that Paulson was the "procurer when Katzman and Harrison entered into the contract for the purchase of the Danville Plaza Hotel."

Katzman testified that the \$1,000 initial payment received from Lovejoy or Paulson was deposited to his personal

agree with Penlon to make a lease to him covering a period of 10 years and prior to the execution of the lease agree that it should be immediately assigned over to a tenant of whom they had never heard.

Counsel for defendants further contend there is no basis in the record on which the judgment against the Danville Plaza Company can be sustained and say that after the Plaza Company was organized it secured a contract to purchase the hotel from Valkenburg & Company from which company Katman had a lease dated March 11, 1938, the lease having been procured by Penlon; that the Plaza Company operated the hotel not as a lessee but as an operating company, that it had nothing to do with the lease to Lovejoy; that the lease on the property was owned by Katman and Harrison in their individual capacities and "when they made the deal with Lovejoy through Penlon, it amounted to a reletting of the hotel." That "inasmuch as the Danville Plaza Company was not and could not be party to the lease" there is no basis

on which liability can be imposed on it for the estate of the principal stockholders in their separate and individual capacities.

Katman, called as an adverse witness under the statute, testified that he was president and director of the Danville Plaza Company; that Penlon was his secretary; that the directors were Katman and wife, and Harrison and wife, and it is admitted that Katman and Harrison are the principal stockholders.

Katman testified that he had a 50% interest in the hotel company, which was organized April 20, 1938. It was stipulated that Penlon was the "promoter" when Katman and Harrison entered into the contract for the purchase of the Danville Plaza Hotel.

Katman testified that the \$5,000 initial payment received from Lovejoy for Penlon was deposited to the personal

account and at another time, that it was deposited to the account of the Danville Plaza Company; that he did not know whether the money in payment of the notes of Lovejoy was received by him or by the Danville Plaza Company.

The evidence further shows that the information for an operating statement of the Danville Plaza Company for the years 1937 and 1938 was furnished by Katzman to Jackson.

While the lease (dated June 1, 1939, between Katzman and Harrison as lessors, and Paulson as lessee, hereinbefore referred to) recites: "WHEREAS, the first party [Katzman and Harrison] is the lessee in a certain lease dated the 11th of March, A. D. 1938, wherein Van Valkenburgh & Company, a corporation is the lessor, and is also the vendee in a certain contract for the purchase of the premises, hereinafter described, from the aforesaid Van Valkenburgh & Company," yet in the brief of defendants it is contended that the Danville Plaza Company is the vendee of the property.

Upon a consideration of all the facts we are of opinion the record shows that defendants attempted to cover up who the real owner of the property was. In these circumstances we think the court was justified in entering judgment against the Hotel Company as well as against the other defendants.

The judgment of the Circuit court of Cook county is affirmed.

JUDGMENT AFFIRMED.

McSurely, P. J., and Matchett, J., concur.

account and at another time, that it was deposited to the account of the Danville Trust Company; that he did not know whether the money in payment of the notes of Danville was received by him or by the Danville Trust Company.

The evidence further shows that the information for an operating statement of the Danville Trust Company for the years 1937 and 1938 was furnished by Nathan to Jackson.

While the issue (Armed June 7, 1938, between Jackson and Harrison as executor, and Jackson as trustee, administrator referred to) resulted: "Harrison, the first party [Jackson and Harrison] is the issue in a certain issue under the will of Marion, A. B. 1938, wherein Van Valkenburgh is executor, a corporation is the issue, and is also the vendor in a certain contract for the purchase of the premises, hereinafter described, from the aforesaid Van Valkenburgh & Company, yet in the bill of defendants it is contended that the Danville Trust Company is the vendee of the property.

Upon a consideration of all the facts we are of opinion the record shows that the facts attempted to cover up and the real owner of the premises was. In these circumstances we think the court was justified in sustaining judgment against the Danville Trust Company as well as against the other defendants.

The judgment of the Circuit Court of Cook County is

affirmed.

THOMAS J. BRADY,

Honorable, J. C., and Associate, J., Circuit.

313 I.A. 147¹

Gen. No. 9690.

Agenda No. 4.

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT
OCTOBER TERM, A. D. 1941.

433
25

ELLEN MCGEE, as Administratrix of the)	
Estate of John McGee, Deceased,)	
)	
Appellant,	)	Appeal from
	)	Circuit Court,
vs.	)	Will County.
)	
EVERETT HENRY,)	
Appellee.)	

WOLFE,-- P. J.

This is an appeal from a judgment on a directed verdict in a suit brought by Ellen McGee as Administratrix of the Estate of John McGee, deceased, against Everett Henry, in which she claimed damages for the death of her husband which was caused by the truck of the defendant striking and killing him. It is claimed by the appellant that the Court erred in directing the jury to find the defendant not guilty, as there was sufficient evidence produced at the trial, that the case should have been submitted to a jury for

3131A.147

October 20, 1947

Gen. No. 2230

IN TWO

APPELLATE COURT OF ILLINOIS

SECOND DIVISION

OCTOBER TERM, A. D. 1947.

WILLIAM MORRIS, as Administrator of the
Estate of JOHN MORRIS, deceased,

vs.

vs.

EVERETT MORRIS,

Appellee.

JOHN MORRIS, deceased,
Estate of JOHN MORRIS, deceased,
vs.

WILLIAM MORRIS, as Administrator of the
Estate of JOHN MORRIS, deceased,

This is the record of the proceedings in the above
captioned cause, which was heard and determined by the
court on the 10th day of October, 1947, at Chicago,
Illinois. The record shows that the appellant, William
Morris, as Administrator of the Estate of John Morris,
deceased, brought this appeal from the judgment of the
circuit court of Cook County, Illinois, entered on the
10th day of October, 1947, in the above captioned cause.
The record further shows that the appellee, Everett
Morris, was appointed executor of the will of John
Morris, deceased, and that the appellant, William
Morris, was appointed administrator of the estate of
John Morris, deceased, by the court of Cook County,
Illinois, on the 10th day of October, 1947.

2.

their consideration. This is the only question involved in the appeal.

From an examination of the evidence as abstracted, it appears that the deceased was employed on a W. P. A. project in the Western part of the City of Joliet, Illinois; that around 11:30 p.m. February 9, 1939, he was walking in a westerly direction on Jefferson Street going towards the place where he was employed as a night watchman; that the defendant was driving a truck in a westerly direction on said Jefferson Street, and overtook a car driven by Eugene Tezak and followed it for a short distance, and then attempted to pass the automobile; that he pulled to the left and had his truck nearly across the black line when he noticed some object pass the window of the cab of his truck, and he heard a thud. He immediately stopped his truck and walked back and found that he had injured the deceased, John McGee, who was lying partly on the pavement and partly on the shoulder. It was raining at the time of the accident, but Henry testified that he could see a distance of 100 feet in front of his truck and that his lights were burning.

If there is any evidence in the record that would tend to support the allegation of the complaint, the Court should not have directed a verdict in favor of the defendant. It is insisted by the appellee that the plaintiff failed to show that the deceased, John McGee, was in the exercise of ordinary care for his own safety at the

their consideration. This is the only document which is in the record.

From an examination of the evidence as presented, it appears that the defendant was a white male, about 35 years of age, Western part of the City of Los Angeles, California, born about 1900. On February 2, 1934, he was walking on a sidewalk adjacent to the intersection of Street 10th Avenue and 11th Avenue in the vicinity of the defendant's residence, when he was observed by a neighborhood watchman, that the defendant was walking in a southerly direction on said sidewalk, and was carrying a bag or satchel in his hand. The defendant followed him for a short distance, but then stopped to pass the sidewalk, and he walked on the sidewalk and was walking nearly across the street line when he noticed some people near the window of the car of the truck, and he started to run. He immediately stopped and took the bag and ran away from the car. He then turned and fled, and was later found in the vicinity of the defendant's residence, and was taken to the hospital, where he died. The defendant was a white male, about 35 years of age, Western part of the City of Los Angeles, California, born about 1900. He was walking on a sidewalk adjacent to the intersection of Street 10th Avenue and 11th Avenue in the vicinity of the defendant's residence, when he was observed by a neighborhood watchman, that the defendant was walking in a southerly direction on said sidewalk, and was carrying a bag or satchel in his hand. The defendant followed him for a short distance, but then stopped to pass the sidewalk, and he walked on the sidewalk and was walking nearly across the street line when he noticed some people near the window of the car of the truck, and he started to run. He immediately stopped and took the bag and ran away from the car. He then turned and fled, and was later found in the vicinity of the defendant's residence, and was taken to the hospital, where he died.

It is the opinion of the jury that the defendant was a white male, about 35 years of age, Western part of the City of Los Angeles, California, born about 1900. He was walking on a sidewalk adjacent to the intersection of Street 10th Avenue and 11th Avenue in the vicinity of the defendant's residence, when he was observed by a neighborhood watchman, that the defendant was walking in a southerly direction on said sidewalk, and was carrying a bag or satchel in his hand. The defendant followed him for a short distance, but then stopped to pass the sidewalk, and he walked on the sidewalk and was walking nearly across the street line when he noticed some people near the window of the car of the truck, and he started to run. He immediately stopped and took the bag and ran away from the car. He then turned and fled, and was later found in the vicinity of the defendant's residence, and was taken to the hospital, where he died.

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time of the accident. The evidence is not disputed that McGee was employed on a W. P. A. project in the westerly part of the City of Joliet; that he was walking in a westerly direction on the south side of the road leading east and west towards the place where he was employed; that he was walking about three or four feet from the south side of the pavement; that the defendant, while driving his truck and attempting to pass the Tezak car, struck and killed the plaintiff intestate. The appellee has cited numerous cases in which it shows the duty of a pedestrian to walk facing the traffic, but has cited no case which shows a man would be guilty of contributory negligence, as a matter of law, if injured while walking in the lane of traffic in which the Statute requires him to walk.

We think that the plaintiff made out a prima facie case which should have been submitted to the jury for their consideration. The judgment of the Trial Court is hereby reversed and the cause remanded.

Judgment reversed and cause remanded.

time of the accident. The evidence is not disputed that McGee was employed on a W. P. A. project in the westerly part of the City of Joliet; that he was walking in a westerly direction on the south side of the road leading east and west towards the place where he was employed; that he was walking about three or four feet from the south side of the pavement; that the defendant, while driving his truck and attempting to pass the Tezak car, struck and killed the plaintiff intestate. The appellee has cited numerous cases in which it shows the duty of a pedestrian to walk facing the traffic, but has cited no case which shows a man would be guilty of contributory negligence, as a matter of law, if injured while walking in the lane of traffic in which the Statute requires him to walk.

We think that the plaintiff made out a prima facie case which should have been submitted to the jury for their consideration. The judgment of the Trial Court is hereby reversed and the cause remanded.

Judgment reversed and cause remanded.

Abstract

313 I.A. 147²

Gen. No. 9696.

Agenda No. 10.

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT
OCTOBER TERM, A. D. 1941.

443
26

J. E. BARBER, Administrator of the)	
Estate of Anna S. Eber, Deceased,	)	Appeal from the Cir-
Plaintiff-Appellee,	)	cuit Court of Lee
	)	County, Illinois, to
vs.	)	the Appellate Court
	)	of the Second District
CLYDE R. NORTHCUTT,	)	of Illinois.
Defendant-Appellant.)	

WOLFE,-- P. J.

This is an appeal brought by Clyde R. Northcutt, the defendant, in a personal injury suit, in which J. E. Barber, Administrator of the Estate of Anna S. Eber, deceased, procured a judgment for \$3,500.00 for damages for the death of Anna S. Eber, deceased. Anna S. Eber died as a result of an injury sustained in a collision between the car in which she was riding with her daughter, Mary Elizabeth Eber, and a car owned and driven by Clyde R. Northcutt. The case was tried without a jury before the Honorable Harry E. Wheat, the Presiding Judge of the Circuit Court of Lee County.

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Page 100

Gen. No. 9100

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The collision occurred at the intersection of two gravel roads, one running practically north and south, and the other east and west. The car in which the deceased was riding with her daughter, Mary Elizabeth Eber, was travelling in a northerly direction, and the car in which the plaintiff was driving, was travelling in an easterly direction. The cars collided at the intersection, and as a result thereof, Anna S. Eber received injuries from which she died a few days thereafter. The defendant was accompanied in his car by members of the family, but none of them were injured.

The east and west road was practically level. On the north and south highway there was a slight slope to the north at the intersection. Both roads were dry and the weather clear. Neither of the roads were preferred highways and had no stop signs or other signs at the intersection. The car in which the deceased, Anna S. Eber, was riding was approaching the intersection from the right, and the defendant, Northcutt's car, from the left.

The appellant, Northcutt, has assigned five reasons why the judgment of the trial court should be reversed. Numbers 1, 2, 3 and 5 are practically the same, namely; that the judgment is contrary to the manifest weight of the evidence, and is contrary to law. The 4th is that the Court erroneously denied the proposition of law submitted by the defendant. In the appellant's brief and argument he states that the Court erred in refusing to hold, as a matter of law,

The collision occurred on the morning of the 10th of April, 1901, at the intersection of the main road and the branch road, near the station. The main road was a single track, and the branch road was a double track. The collision was caused by the fact that the main road was not properly marked, and the branch road was not properly guarded. The collision resulted in the death of one person and the injury of several others. The investigation of the collision has shown that the main road was not properly marked, and the branch road was not properly guarded. The investigation has also shown that the collision was caused by the fact that the main road was not properly marked, and the branch road was not properly guarded. The investigation has also shown that the collision was caused by the fact that the main road was not properly marked, and the branch road was not properly guarded.

3.

certain propositions, but does not argue these points nor set forth the refused propositions in his brief and argument. Points raised, but not argued will be deemed waived by this Court.

Judge Wheat, in deciding the issues of fact and law, uses this language: "The testimony of the witnesses in this case is conflicting on the material issues; it conflicts on the question as to whether the north bound car was on the east or west side of the road; it conflicts as to the speed of both cars; it is disputed as to whether defendant's car was stopped or in motion, and as to where in the intersection the impact occurred. In view of such testimony, it is obvious that some or all of the occurrence witnesses are mistaken, in which event, great weight must be attached to circumstantial evidence, insofar as it tends to corroborate or contradict the witnesses on material points."

The judge then proceeded to analyse the testimony and circumstances, as related by the witnesses, and came to the conclusion that the accident in question was caused by the negligence of the defendant, Clyde R. Northcutt, and that the deceased, Anna S. Eber, and her daughter, Mary Elizabeth Eber, were not guilty of contributory negligence. We have read the evidence as abstracted, and think the trial Court's analysis of the evidence and his conclusions of facts and law are sustained by the record in this case.

We find no reversible error in the case. The judgment of the Trial Court is affirmed.

Affirmed.

certain propositions, but does not agree with the others, and the
the refused propositions in his trial and verdict. The trial
but not agreed will be deemed waived by this court.

Under what, in dealing, the names of these persons, and
this language: "The testimony of the witnesses in this case is
filing of the material issues; it is not the question as to
whether the words found in the act of 1887 are in fact
it conflicts as to the facts of this case; it is a matter as to whether
Beland's case was stopped or in action, and as to what is the
section the facts occurred. In view of such testimony, it is obvious
that some or all of the charges against the witness, in which
great weight must be attached to circumstantial evidence,
in order as it tends to corroborate the testimony of the witness
material points."

The facts then presented in this case are as follows:

circumstances, as related by the witness, and also to the testimony
that the accused in question was found by the jury guilty of the
charge, that is, murder, and that the accused, June 2, 1887,
and her daughter, Mary, killed the man, and the result of the
murder. The case was the evidence as presented, and with the
trial court's finding of the evidence and the conclusions of law and
law are attached to the record in this case.

As this is a criminal case, the facts are as follows:

of the trial court is as follows.

Abstract

Gen. No. 9706.

Agenda No. 13.

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT
OCTOBER TERM, A. D. 1941.

313 I.A. 148¹

463

Dovie Wilson, as Administratrix of
the Estate of Charles Herbert
Wilson, deceased,
Plaintiff-Appellee,
vs.
Decatur Cartage Company, an Illi-
nois Corporation, and Jessie Boomer,
Defendants-Appellants.

Appeal from the
Circuit Court of
Kankakee County.

WLF,-- P. J.

The plaintiff-appellee, Dovie Wilson as Administratrix of the Estate of Charles Herbert Wilson, deceased, commenced a suit in the Circuit Court of Kankakee County. The defendants-appellants are Decatur Cartage Company, an Illinois Corporation, and Jessie Boomer. The action is for damages for the death of Charles Herbert Wilson, Plaintiff-appellee's intestate, who was killed in an automobile collision on May 7, 1940, when a truck in which he was driving collided with the rear of the truck of the Decatur Cartage Company driven by Jessie Boomer.

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At the time, the truck of the defendants was parked on the outer lane of traffic of a four-lane highway. The complaint is in the usual form and charges the defendants with general negligence by parking on a State Route contrary to statute, by failure to light truck and trailer, by failure to provide flares, by failure to keep a sufficient lookout, and by failure to keep motor truck under proper, safe and reasonable control.

There is no question raised in this appeal about the pleadings. The case was submitted to a jury who found the issues in favor of the plaintiff and assessed damages at \$7,500.00 for the death of Charles Herbert Wilson, and for the damage to the truck of plaintiff at \$843.50. The defendants filed motions for a directed verdict, judgment notwithstanding the verdict and for a new trial, all were denied. Judgment was then entered on the verdict for the amounts. It is from this judgment that the appeal is prosecuted.

It is insisted by the appellants that the charge of negligence in leaving the truck without adequate lights, or other warning of its presence on the highway is unsupported by the evidence. Examination of the testimony as abstracted, discloses that all witnesses except the defendant, Jessie Boomer, either testified positively that there were no lights burning on the truck, or trailer of the Decatur Cartage Company, or that they did not see any lights so burning, nor did any of these witnesses see any flares burning at the time that the first

3.

witness appeared upon the scene of the accident. The only witness who testified of any lights burning on the defendants' truck and trailer at the time of the accident, was Jessie Boomer. This was purely a question of fact to be submitted to the jury. The jury, by their verdict, have on this issue found in favor of the plaintiff, and against the defendants and we think that there is ample evidence in the record to support this finding of the jury.

It is claimed by the appellants that the truck standing on the highway was a mere condition, and not the proximate cause of the accident. This accident occurred on Route 49 about two miles North of the City of Mantena, Illinois. Route 49 is a four-lane paved highway forty feet wide. At the place of the accident, there was a shoulder twelve feet wide on each side of the pavement. Jessie Boomer, the driver of the Decatur Cartage Company's truck, was going in a southerly direction when he heard a loud noise under the truck or trailer. He stopped his truck and trailer on the west side of the pavement and got out and crawled under the truck to see what was the matter. He found that the spare tire had become detached from the truck and was dragging on the pavement. While under the truck fixing this tire, he was facing south, the direction his truck was headed. While he was replacing the tire the decedent, Charles Herbert Wilson, driving his truck ran into the rear of the defendants' truck and received the injuries from which he later died. It is uncontradicted that other

4.

truck drivers, arriving at the scene of the accident, drove their trucks off of the pavement onto the shoulder and experienced no difficulty whatsoever, in doing so. All stated that the shoulder was of adequate width, perfectly dry and hard. It appears that if the defendant, Boomer, had been so inclined he could have driven his truck off of the pavement and onto the shoulder to replace the tire without any difficulty in doing so. It is stipulated that there are signs erected by the State Highway Department along various points of this highway, and state in substance, "Drive in the outside lane except when passing." We find no merit in the contention that the presence of this unlighted truck upon the paved portion of the highway was not the proximate cause of the accident and injuries to plaintiff's intestate which caused his death.

Over the objection of the defendant, the plaintiff proved habits of due care and caution of deceased that he was a cautious and careful driver. It is contended by the appellant that this was improper because the defendant, Jessie Boomer, was an eye witness to the accident. After a careful reading of the evidence of Jessie Boomer, both in the abstract and the record, we fail to find any place where he states that he saw or knew anything about the accident until it actually occurred. He was rendered unconscious for a short time by the collision of the two trucks. It is conceded that there was no other eye witness to the accident, so we think the Court properly admitted the evidence

truck drivers, arriving at the scene of the accident, drove back
trucks off of the pavement onto the shoulder and expended no
difficulty whatsoever, in doing so. It is noted that the shoulder was
of adequate width, perfectly dry and level. It appears that at the
accident, however, there had been no facilities for a driver to turn
off of the pavement and onto the shoulder to replace the tire without
any difficulty in doing so. It is stipulated that there are signs
erected by the State Highway Department along various points of the
highway, and state "no vehicles" "No vehicles except
when passing." It is noted that the contentment that the property
of this unlighted truck upon the paved portion of the highway was not
the proximate cause of the accident and injuries to Plaintiff's in-
juries which caused his death.

Over the objection of the defendant, the Plaintiff's propo-
sitions of the care and control of deceased that he was a careless and
careful driver. It is contended by the defendant that this was in-
proper because the defendant, Justice Brown, was an eye witness to the
accident. After a careful review of the evidence of Justice Brown,
both in the abstract and the record, we find no fault and hence there is
stated that he saw or knew anything about the accident and it is actually
contended. He was not present at the scene of the collision
of the two trucks. It is contended that there was no other eye witness
to the accident, so we think the Court properly admitted the evidence

5.

of due care and caution on the part of the deceased. Our Courts have repeatedly held that where there are no actual eye witnesses to an accident, the habits of the deceased are competent to show due care on his part at time of accident. Humason vs. Michigan Central Railroad Company 259 Ill., 462; Greene vs. Fish Furniture Company 272 Ill. 148. Under the circumstances as presented in this case, the question of whether the deceased was guilty of negligence that proximately contributed to his death, was a question of fact for the jury to decide.

Complaint is made by the appellants in regard to some of the given instructions for the plaintiff and some that the Court refused to give on behalf of the defendants. What we have heretofore said in regard to the evidence in regard to due care is applicable to defendants' refused instruction No. 1. In regard to appellants' instruction No. 2, it is a general one and is covered by parts of defendants' instruction Nos. 3, 4, and 6. We find no merit in appellants' criticism of plaintiff's given instruction No. 1, or No. 3. On the whole we think that the Court fairly instructed the jury relative to the law in the case.

We find no reversible error in the case. The judgment of the Trial Court is affirmed.

Affirmed.

313 I.A. 148²

Gen. No. 9708.

Agenda No. 40.

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT
OCTOBER TERM, A. D. 1941.

LYLE N. GRANGE,
Petitioner-Appellee,

vs.

W. W. RENTON, Mayor of the City of Wheaton,
Successor to William H. Caldwell,
C. R. BURKHOLDER, Chief of Police,
A. M. JENS, D. L. BODEN and J. C. HYDE,
Successor to H. F. DAVIS, Fire and Police
Commissioners of the City of Wheaton, City
of Wheaton, a Municipal Corporation, and
C. O. FREEDLUND, Treasurer of the City of
Wheaton,
Respondents-Appellants.

Appeal from
Circuit Court,
DuPage County.

WOLFE,-- P. J.

The appellee, Lyle N. Grange, filed in the Circuit Court of DuPage County, a petition for mandamus against W. W. Renton, the Mayor of the City of Wheaton, Successor to William H. Caldwell, C. R. Burkholder, Chief of Police, A. M. Jens, D. L. Boden and J. C. Hyde, Successor to H. F. Davis, Fire and Police Commissioners of the City of Wheaton, City of Wheaton, a Municipal Corporation, and

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Page No. 10.

Page No. 10.

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IN THE
APPELLATE COURT IN INDIANA
SECOND DISTRICT
OCTOBER TERM, A. D. 1941.

LYLE H. BRADY,
Petitioner-Appellee,

vs.

J. W. HARTMAN, Agent of the City of
Successor to William H. Galloway,
J. R. BURKHOLDER, Agent of Police,
J. E. JAMES, J. J. JONES and J. C. JONES,
Successors to F. W. JONES, City
Commissioners of the City of
of a Mayor, Municipal Corporation, and
J. C. FARMER, Treasurer of the City of
Wheaton,
Respondents-Appellants.

A Small Town
County of
Indiana

FILED -- P. 5.

The following is a list of the names of the
of Police County, a list of the names of the
Mayor of the City of Wheaton, Successor to William H. Galloway,
J. R. BURKHOLDER, Agent of Police, J. E. JAMES, J. J. JONES and J. C. JONES,
Successors to F. W. JONES, City Commissioners of the
City of Wheaton, J. C. FARMER, a Municipal Corporation, and

2.

C. O. Freedlund, Treasurer of the City of Wheaton, alleging duress in obtaining the petitioner's resignation as Chief of Police of the City of Wheaton, Illinois, and alleging that he resigned involuntarily. The plaintiff asked to be reinstated and to be assigned to the Police Department of the City of Wheaton as Chief of Police, Sergeant or Patrolman, and that his name be restored to the pay rolls of said city. The petition, as amended, alleges that the petitioner was appointed Chief of Police on the 12th day of May 1931; that in April 1934, the electors of the City of Wheaton adopted the 'Fire and Police Commissioner's Act,' whereupon, the Police Department became subject to the rules and regulations of the Board of Fire and Police Commissioners of the city. It is further alleged that on August 3, 1937, Doctor W. V. Hopf, Commissioner of Health and Safety and in charge of the Police Department of said city, told the petitioner that the Board of Fire and Police Commissioners requested him to obtain the petitioner's resignation; that on that date he resigned, which resignation he subsequently withdrew; that on October 6, 1937, Doctor W. V. Hopf again told the petitioner that unless he resigned, he could be ousted from his position, whereupon, he tendered his resignation, which is as follows:

"Wheaton, Illinois,
October 6, 1937.

Doctor W. V. Hopf,
Commissioner of Public Health and Safety.

Please accept my resignation as Chief of Police of the City of Wheaton to be effective from this date.

... O. ... of the City of ...
... the ... Police ...
... of ... , ...
... asked to be ...
... of the City of ...
... and that his name be ...
... The ...
... Chief of Police on the 1st day of May 1931; that in April
1934, the ... of the City of ...
Commissioner's Act; ...
... and regulations of the Board of ...
the city. It is further alleged that on August 3, 1937, Doctor W. V.
... of ... and salary and in ... of the Police
... of said city, told the ... that the Board of ...
and Police Commissioner requested ... to ...
... that on that date ...
... on October 3, 1937, Doctor W. V. ... again
old the petitioner that ...
... position, ...

... follows:
... Doctor W. V. ...
Commissioner of ...
... of Police in the City
... to be effective from this date.

3.

I have appreciated your help in a great many ways since you have taken office.

Signed Lyle N. Grange,
Chief of Police."

The petition further alleges that said resignation was intended to apply only to the office of Chief of Police, and not to membership in the department, and was obtained by threats of duress and coercion; that subsequent to the first day of January A. D. 1938, the petitioner reported to the police station for work, but his services were declined.

It is further charged that he was unlawfully and illegally discharged in violation of Section 12, of the 'Fire and Police Commissioner's Act,' and he asked that a writ of mandamus be issued to restore him as Chief of Police, Sergeant or Patrolman of the City of Wheaton, and to restore his name to the pay roll of said city.

The defendants filed their answer admitting that the petitioner, Lyle N. Grange, had resigned, as stated in the petition, but that the resignation was not simply as Chief of Police, but as an unconditional resignation from the Police Department of the City of Wheaton. The answer also denies that there was any duress whatsoever in obtaining petitioner's resignation, or that petitioner brings himself within the 'Fire and Police Commissioner's Act,' or that he is entitled to the protection of said act. It alleges that Lyle N. Grange acted freely and voluntarily in resigning from the Police Department, but denies that he was unlawfully or illegally discharged.

I have explained your role in a general way since

you have been sitting.

James W. Smith,
Chief of Police.

The petition further alleges that said respondent was intended to

apply only to the office of Chief of Police, and not to necessarily

in the department, and was contained in the hands of various and covering;

that subsequent to the time that it was received in 1935, the petition

reported to the police station for work, but its services were limited.

It is further charged that he was unlawfully and willfully

discharged in violation of Section 14 of the Police Department's

Act, and he asked that a writ of mandamus be issued to restrain him as

Chief of Police, Sergeant or Patrolman of the City of Chicago, and to

rejoice his name to the pay roll of said city.

The defendant's brief made answer admitting that the peti-

tioner, City of Chicago, was intended in the petition, but

that the petition was not aimed at the Chief of Police, but as an in-

conditional restriction on the police department of the City of Chicago.

The answer also states that there was no intent whatsoever in connection

with the petition to restrict or limit the police department in its

functions and that the petition was not intended to be limited to the

protection of said Act. It alleged that City of Chicago acted freely

and voluntarily in connection with the police department, but denied

that he was unlawfully or illegally discharged.

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The case was tried before the Court who found that the petitioner had resigned as Chief of Police, but had not resigned from the Police Department of the City of Wheaton. The Court also found, that petitioner did not sustain the burden of proof in showing that he was coerced in resigning as Chief of Police of the City of Wheaton, but did find that Section 12, of the 'Fire and Police Commissioner's Act,' as amended in 1937, should operate retroactively, and that the petitioner, Lyle N. Grange, was unlawfully and illegally discharged as a member of the Police Department of the City of Wheaton. The Court ordered that a writ of mandamus be issued to restore the said Lyle N. Grange on the city's record as a Patrolman and member of the Police Department of the City of Wheaton. It is from this order that the appeal is prosecuted.

In order to sustain the contention that the petitioner tendered his resignation under duress and coercion, Lyle N. Grange, over the objection of the defendants, testified to numerous conversations that he had had with Doctor Hopf, the Commissioner of Health and Safety of the City of Wheaton. At the time of the hearing, Doctor Hopf was dead. The Court announced that he would hear the evidence subject to the objection of the defendants. In the appendix attached to the appellee's brief, we find the decision of the trial court in which he announces that the conversations related by Mr. Grange with Doctor Hopf were not admissible in evidence, and he was not considering

it as evidence. In the Third Paragraph of the judgment order the Court finds: "That the conversations petitioner is alleged to have had with Doctor W. V. Hopf, Commissioner of Health and Safety of the City of Wheaton, is inadmissible as evidence of this case." There is therefore no evidence whatsoever to sustain the contention of the petitioner that he resigned under duress and coercion of any member of the Police Department, nor is there any evidence that anything was said or done at the time the resignation was tendered by the petitioner, that would sustain his contention that he intended to resign only as Chief of Police, and not from the Police Department.

It is admitted by the pleadings that after Mr. Grange tendered his resignation, the City of Wheaton continued to pay his salary as Chief of Police up to and including January 1, 1938. It will be observed that this was under the old appointment as Chief of Police, and not as a Patrolman. The evidence shows that subsequent to the first day of January, A. D. 1938, that Mr. Grange presented himself to the Chief of Police of the City of Wheaton, and requested that he be assigned duties in connection with the department, but he was told that he was no longer connected with the Police Department, and that it was impossible to assign him any duties.

There being no evidence to sustain the petitioner's contention that his resignation was procured by duress or coercion by the city, or what was said and done by the various parties at the

it is evidence. In the case of the witness, the Court
finds: "There is no evidence that the witness is a
Doctor W. V. Jones, the witness of death and burial of the body of
Wharton, is inadmissible as evidence of this case." There is evidence
no evidence that the witness is a doctor, the doctor of the witness that
he resigned under threat and coercion of the witness of the witness
Department, nor is there any evidence that the witness was a doctor of
at the time the witness was a doctor of the witness, but the
evidence is evidence that is evidence of the witness, but the
Police, and not from the Police Department.
It is evidence of the witness that the witness is a
tendered in resignation, the witness of the witness is a
salary of \$1000 of the witness is a doctor of the witness, 1933, 1934
will be evidence that the witness is a doctor of the witness, 1933, 1934
of Police, and not as a doctor of the witness, 1933, 1934
to the first day of January, 1933, 1934, the witness is a doctor of the witness
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that he be a doctor of the witness, 1933, 1934, the witness is a doctor of the witness
was told that he was a doctor of the witness, 1933, 1934, the witness is a doctor of the witness
and that it was impossible to be a doctor of the witness, 1933, 1934, the witness is a doctor of the witness
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the city, or that was a doctor of the witness, 1933, 1934, the witness is a doctor of the witness

time the resignation was tendered, the only question for us to decide is what is meant by the petitioner's written resignation. If it must be construed that Mr. Grange resigned from the Police Department instead of just as Chief of Police, the other questions argued in the briefs of the parties become immaterial. It appears to us that the proper construction to be given to this resignation, is, that the petitioner intended to, and did resign from the Police Department of the City of Wheaton, Illinois.

It will be noted that the petition charges the officers of the Police Department of the City of Wheaton, of obtaining this resignation under duress and coercion. If this had been proven, it would make no difference whether he had resigned simply as Chief of Police, and not as Patrolman, or whether he had resigned from the Police Department. If he could prove that his resignation was not voluntarily tendered, then he would be entitled to the writ of mandamus to be reinstated as a member of the Police Department. Another thing we think tends to show that he resigned from the Police Department and not simply as Chief of Police, is that the city voluntarily paid him three months' salary, not as a Patrolman, but as Chief of Police, and at the end of that time the city notified him that he was no longer a member of the police force of the City of Wheaton, Illinois.

To entitle the petitioner to the writ of mandamus, he must establish his right to the writ by clear and convincing evidence. This,

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he has failed to do. It is our conclusion the trial court erred in finding that Lyle N. Grange, by his written resignation of October 6, 1937, resigned only as Chief of Police, and not as a member of the Police Department. The order appealed from is therefore reversed.

Reversed.

The above information was obtained from the records of the Police Department. The person named in the foregoing paragraph, 1937, resigned as Chief of Police, and was succeeded by Mr. [redacted] finding that [redacted], the present position of [redacted]. He has failed to do so. It is our intention to [redacted] and [redacted] [redacted]

• **CONVULSIONES**

Abstract

313 I.A. 149¹

Gen. No. 9719.

Agenda No. 22.

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT
OCTOBER TERM, A. D. 1941.

473
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CLARENCE SANDBERG, a minor,)
by Charles A. Sandberg, his)
next friend,)
Appellee,)
vs.)
MARION C. WILLIAMS, MARVIN)
C. WILLIAMS, and JOHN R. ANDREWS,)
Appellants.)

Appeal from the
City Court of
Aurora, Illinois.

WOLFE,-- P. J.

This is an action to recover damages from Marion C. Williams and Marvin C. Williams for an injury resulting from a collision between the motorcycle on which Clarence Sandberg was riding and the automobile of Marvin C. Williams, which was being operated by Marion C. Williams at the time of the collision. The complaint consisted of four counts, but before going to the jury, the third count was dismissed. The first count of the complaint, commonly

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called the Jennings's Count, charges that Marion C. Williams, on her own behalf, and as the agent of Marvin C. Williams, negligently operated an automobile which caused the injury to the plaintiff. The second count charges that Marion C. Williams, while driving the car as aforesaid, failed to yield the right of way to the plaintiff, Carl Sandberg, and the fourth count, that Marion C. Williams failed to keep a proper lookout for Carl Sandberg, and therefore the plaintiff was injured. All of the counts charged that at the time of the injury to the plaintiff, he was in the exercise of due care and caution for his own safety.

At the close of the plaintiff's case the defendants entered a motion for a verdict for the defendants. This motion was denied. At the conclusion of all of the evidence, a like motion was made by the defendants. This motion was also denied. The case was submitted to a jury who found the issues in favor of the plaintiff and assessed the damages at three thousand dollars. The defendants entered a motion for a new trial, which was overruled, and judgment was entered on the verdict in favor of the plaintiff for three thousand dollars. It is from this judgment that the appeal is prosecuted.

The evidence discloses that on July 4, 1940, the plaintiff was riding and driving his motorcycle in a westerly direction on Main Street in the City of Aurora, Illinois; that the defendant, Marion C. Williams, is the wife of Marvin C. Williams, and that their residence

called the "Lumber Yard", owned and operated by William J. Williams, on the
own behalf, and as the agent of William J. Williams, negligently
operated an automobile which caused the injury to the plaintiff.
The second count charges that William J. Williams, while driving the
car as aforesaid, failed to yield the right of way to the plaintiff,
Carl Campbell, and his family, and that William J. Williams failed
to keep a proper lookout for Carl Campbell, and therefore the injury
to him was caused. All of the counts charged that the injury to the
plaintiff was caused by the negligence of the defendant, and that the injury
to the plaintiff, in the exercise of due care and caution
for his own safety.

At the time of the plaintiff's injury, the defendant was engaged
in a motion picture business. The defendant, in this motion picture
the connection of all of the evidence, a like motion picture was made by the
defendant. This motion picture was also made. The same was made by the
jury who found the facts in favor of the plaintiff and assessed the
damages at \$10,000.00. The defendant moved a motion picture
a new trial, and the court, in its opinion, and judgment, in the verdict
in favor of the plaintiff, the court, in its opinion, and judgment, in the verdict
judgment that the amount of damages.

The evidence disclosed that on the 1st of May, 1920, the plaintiff
was riding his bicycle in a westerly direction on the
Street at the time of the accident, and that the defendant, William J.
Williams, in the exercise of due care and caution, and judgment, in the verdict

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is located on the south side of Main Street in said City of Aurora; that Marion C. Williams was driving her husband's automobile out of her driveway in a northerly direction towards Main Street; that said driveway was on the east side of the dwelling house; that the lot on which the dwelling house is located is 55 feet east and west exclusive of the driveway; that before Mrs. Williams entered Main Street, she stopped with the front end of her car on the sidewalk in front of the house; that she left the car there and went into her home to get her pocket-book; that she came out and started her car. She looked to her right, which would be east, and saw the plaintiff approaching on his motorcycle at the intersection of the street east of her home; that she looked to her left and waited until no cars were passing, then proceeded in a northerly direction and turned to the left and had proceeded in a westerly direction at least 58 feet when the motorcycle, driven by the plaintiff, collided with the right rear fender of the defendants' car; that plaintiff was thrown from his motorcycle and was injured; that at the time the collision occurred, the defendants' car was all or practically all on the north side of the white line in the center of the street; that at this place the paved part of Main Street is 41 feet wide; that on the south side of Main Street next to the defendants' home there was a parked car; that on the north side of Main Street near where the accident occurred, there was also a parked car; that at this time there were no cars approaching, either

is located on the other side of the street is all right on the street.
That morning, J. Williams was driving his automobile and was
not driving in a normal manner. He was driving in a normal manner.
driver was on the east side of the street. That is, the driver
which the driver was on the east side of the street. That is, the driver
of the driver; that is, the driver was on the east side of the street.
stopped with the driver and the driver was on the east side of the street.
the driver; that is, the driver was on the east side of the street.
her pocket-book, and she was on the east side of the street. The driver
her right, which would be the driver, and the driver was on the east side of the street.
his motorcycle as the driver of the motorcycle of the driver of the motorcycle.
that the driver was on the east side of the street. That is, the driver
then proceeded in a normal manner and was on the east side of the street.
proceeded in a normal manner and was on the east side of the street.
driver of the motorcycle, collided with the driver of the motorcycle.
Delaware, and that driver was on the east side of the street.
was injured; that is, the driver was on the east side of the street.
one was all on the east side of the street. That is, the driver
in the center of the street; that is, the driver was on the east side of the street.
Main street in the east side of the street. That is, the driver
next to the driver of the motorcycle, and the driver was on the east side of the street.
side of Main street and was on the east side of the street. That is, the driver
method was; that is, the driver was on the east side of the street.

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from the east or west near where the collision occurred. The evidence further shows that the plaintiff, as he approached the driveway from which the William's car was emerging, saw the car and that it was moving at the time he first saw it, but he did not see the car again until just before the collision occurred. There is very little, if any, dispute about any material fact in issue in this case.

The appellants seriously insist that there is no evidence in the record to show that the plaintiff was in the exercise of ordinary care for his own safety at the time the collision occurred, also that there is no evidence tending to show that the defendants were guilty of any negligence which was the proximate cause of the injury to the plaintiff. It is also insisted by the appellants that the verdict of the jury is against the weight of the evidence.

Appellate Courts are reluctant to set aside the verdict of a jury wholly on a question of fact, but when the Court is convinced that the verdict of a jury is against the manifest weight of the evidence, then it is the duty of the Appellate Tribunal to exercise its discretion and reverse the judgment. After reading all of the evidence in this case, it is our conclusion that the verdict of the jury in this case is contrary to the manifest weight of the evidence. The judgment of the Trial Court is hereby reversed and the cause remanded.

Reversed and Remanded.

From the time of the collision, the evidence further shows that the defendant, having been in the position of a driver, was not in any way involved in the collision, and that the collision occurred in the ordinary course of traffic.

The evidence further shows that the defendant was not in any way involved in the collision, and that the collision occurred in the ordinary course of traffic. It is also shown that the defendant was not in any way involved in the collision, and that the collision occurred in the ordinary course of traffic.

The jury is asked to find that the defendant was not in any way involved in the collision, and that the collision occurred in the ordinary course of traffic. It is also shown that the defendant was not in any way involved in the collision, and that the collision occurred in the ordinary course of traffic.

Abstract

313 I.A. 149²

Gen. No. 9726.

Agenda No. 25.

IN THE
APPELLATE COURT OF ILLINOIS,
SECOND DISTRICT.

OCTOBER TERM, A. D. 1941.

JOSEPH LEONARD, a Minor, by AGATHA
FITZJARRALD, His Mother, as Next
Friend,
Plaintiff-Appellee,
vs.
WAYNE STONE,
Defendant-Appellant.

Appeal from
Circuit Court,
Peoria County.

WOLFE,-- P. J.

This is an action at law brought by Joseph Leonard, a minor, by Agatha Fitzjarrald, his mother, as next friend, against Wayne Stone in which the plaintiff claims damages for injuries he sustained in an accident in which Joseph Leonard was a passenger in the automobile of Wayne Stone. The accident occurred on the 18th of January 1939, on Westmoreland Street in the City of Peoria, Illinois.

The plaintiff's complaint consists of four counts. The first

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PLATE 1

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count charged the defendant with general negligence and careless conduct in the operation of the automobile. The second count charged the defendant with the failure to keep said automobile under safe and proper control. The third count charged the defendant with negligence in carelessly managing and operating the automobile at an excessive rate of speed when there was ice on the pavement, and causing the automobile to skid and injuring the plaintiff. The fourth count charged the defendant with wilful and wanton misconduct in the operation of the automobile. The first three counts charged that through the negligence of the defendant in the way he managed and operated the automobile, the plaintiff was injured, and at all times the plaintiff was in the exercise of ordinary care for his own safety. The fourth count charges that by reason of the wilful and wanton misconduct of the defendant, the plaintiff was injured. The defendant filed his answer denying the allegations of any negligence, as charged in the first three counts, and of any wilful and wanton misconduct on the part of the defendant, as charged in the fourth count. After the trial had proceeded and four jurors had been accepted by the plaintiff, the plaintiff dismissed the fourth count of the complaint. The case proceeded to trial under the first three counts of the complaint, and the jury found the issues in favor of the plaintiff, and assessed his damages at \$1,500.00.

At the close of the plaintiff's evidence, the defendant

amount charged the defendant with the willful neglect and derelict
conduct in the operation of the automobile. The second count charged
the defendant with the failure to keep said automobile under proper
proper control. The third count charged the defendant with negligence
in carelessly handling and operating the automobile at an excessive
rate of speed when there was for the prevention, and causing the
automobile to collide with the plaintiff. The fourth count
charged the defendant with willful and wanton misconduct in the
operation of the automobile. The fifth count charged the defendant
through the negligence of the defendant in that way he caused and
operated the automobile, the plaintiff was injured, and as will show
the plaintiff was in the exercise of ordinary care for his own safety.
The fourth count charges that by reason of the willful and wanton mis-
conduct of the defendant, the plaintiff was injured. The defendant
lied the answer denying the allegations of the plaintiff, it was
in the first place denied, and of any willful and wanton misconduct on
the part of the defendant, as charged in the fourth count. After the
trial had commenced and the jury had been instructed by the court,
the plaintiff presented the fourth count of the complaint. The case
proceeded to trial on the first three counts of the complaint, and
the jury found the facts in favor of the plaintiff, and assessed the
damages at \$1,500.00.
At the close of the plaintiff's evidence, the defendant

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offered a motion asking the court to instruct the jury to find the defendant not guilty. This motion was denied by the Court. At the close of all of the evidence, the defendant again asked the Court to instruct the jury to find the defendant not guilty. This motion was also denied. Prior to the closing argument to the jury, the defendant tendered to the Court a special interrogatory, and asked the same be given to the jury. This request was also refused by the trial court. Judgment was then entered on the verdict in favor of the plaintiff for \$1,500.00, and it is from this judgment that the appeal is prosecuted.

After the plaintiff had dismissed the fourth count of the complaint, the defendant asked leave to file an amended answer to the first three counts of the complaint. They now insist in this Court that it was reversible error for the Trial Court to refuse to allow them to file an amended answer. The assignment of error, as stated in their argument is, "The Court erred in refusing to allow the defendant to withdraw his answer and file motion to dismiss, which motion was filed before the jury and the taking of evidence, and if allowed, would have given the defendant more specific information." What the answer was, as originally filed, is not disclosed by the abstract, as the same is not contained therein. The filing of a motion or the granting of leave to file further pleadings, is largely in the discretion of the trial court. What the amended answer would contain, which was not contained

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in the original answer, the record does not disclose, and how the defendant was prejudiced in any manner, is not shown by the record in this case.

It is also insisted that the three counts in the complaint failed to charge the defendant with wilful and wanton misconduct, therefore the Court erred in refusing to hold that the plaintiff could not recover because of the Guest Statute of the State of Illinois. The Supreme Court, in the case of Connett vs. Winget 374 Illinois 531, in discussing whether a person is a guest, as defined in our Statute, uses this language: "In determining whether a person is a guest within the meaning of the "Guest statutes" in the several States, consideration is given to the person or persons advantaged by the carriage; if it confers only a benefit incident to hospitality, companionship or the like, the passenger is a guest, but if the carriage tends to promote mutual interests of both the person carried and the driver, or if the carriage is primarily for the attainment of some objective or purpose of the operator, the passenger is not a guest within the meaning of such enactments." In order to decide whether the plaintiff was a guest in the defendant's car, it is necessary to review the evidence. The plaintiff testified that he had been employed by the defendant to do odd jobs such as running errands, occasionally tending to the soda fountain and cleaning the restaurant or lunch stand which the defendant was operating at the time of, and previous to the accident in question.

in this case.

It is also possible that the first group of the Committee failed to state the reasons why it was not possible to recover because of the action of the State of Illinois. The Supreme Court, in the case of *Conner v. Illinois*, 338 U.S. 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930,

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The place of business was what is commonly called a "Drive in Refreshment Stand." According to the plaintiff's testimony, he was employed the night of the accident in this kind of work, and about ten or eleven o'clock in the evening his aunt called to take him home, and that the defendant, Stone, told the aunt that he wanted the boy to stay at the restaurant and help him with the work and sweep up just prior to the time they closed the restaurant, and that he would take the plaintiff home. The defendant was called as an adverse witness by the plaintiff, and he denied that the plaintiff had ever worked for him, or that he had any such conversation with the boy's aunt. He denied that the aunt called at the place of business the evening of the accident, or that he knew the aunt. The plaintiff introduced in evidence a written statement which the defendant admits that he signed shortly after the accident occurred. This exhibit shows that he stated then that the boy had worked for him previous to the accident on several occasions; that he had paid him small amounts for his services, and that he was working for him the night of the accident; that the aunt called for the plaintiff and he told her that he wanted the plaintiff to stay there and help him, and that he would see that the boy was taken home after they closed the place of business.

In the car at the time of the accident, were two other persons. One was Ruth Tockes who also worked at the restaurant and Stephen Mitrovich who was a friend of Miss Tockes and had spent the

place of business was run by a woman called a "baron" in Russian. According to the plaintiff's testimony, he was employed the night of the accident in this line of work, and about ten or eleven o'clock in the evening he was called to take the car, and took the defendant, Starn, with him and he wanted to go to the place of the restaurant and help him with the work and wait for just before the time they closed the restaurant, and that he went to take the plaintiff home. The defendant was called as an adverse witness by the plaintiff, and he denied that the plaintiff had been working in any way, or that he had any such conversation with the defendant. He denied that the plaintiff called at the place of business the evening of the accident, or that he knew the name. The plaintiff introduced in evidence a witness statement which the defendant denies that he signed, and that the accident occurred. This exhibit shows that he signed that the car was taken for his previous in the accident on several occasions; and he had given him small amounts for the previous, and that he was working for him the night of the accident; and the name called for the plaintiff and he told her that he wanted the plaintiff to stay with him and help him, and that he would see him the next day at the restaurant. This exhibit shows the place of business.

6.

most of the evening at the restaurant. Each testified that they saw the aunt of the plaintiff come to the restaurant, and heard her ask the plaintiff to go home with her, and heard the defendant say that he wanted the plaintiff to stay at the restaurant and help him until he closed up, and that he would take the plaintiff home. From this evidence, it clearly appears that the plaintiff had worked for the defendant prior to the time of the injury, and had been employed by him several hours before the accident occurred, and as part of the employment he was to see that the plaintiff was taken home. When the defendant requested the plaintiff to stay and help him out in the conduct and care of his restaurant, and agreed to take him home after the restaurant was closed, and then in fulfillment started home with the plaintiff, then the carriage tended to promote the mutual interest of both the plaintiff and defendant, and under the rule, as announced in *Connett vs. Winget*, supra, the plaintiff was not a guest, but a passenger in the car of the defendant.

It is next insisted that the Court erred in the admission of incompetent, improper and irrelevant medical testimony on the part of the plaintiff. The record does not disclose that the defendant made any objection whatsoever to any of the questions asked, or to the doctor's answers when he gave his testimony. Therefore this assignment of error cannot be considered by this Court.

It is also insisted that the Court committed reversible

most of the evening at the restaurant. When he arrived home early
the next morning, he found the plaintiff in the kitchen, and
the plaintiff told him that she had been at the restaurant and
He wanted the plaintiff to stay at the restaurant and help him
he closed up, and came home with the plaintiff. From this
evidence, it clearly appears that the plaintiff had worked for the
defendant prior to the time of the injury, and was employed by
him several months before the accident occurred, and as part of his
employment he was to wait on the plaintiff and his wife. When the
defendant requested the plaintiff to stay and help him out on the
conduct and care of the restaurant, and wanted to take him and wife
the restaurant was closed, and that is why the plaintiff stayed with him
plaintiff, that the defendant wanted to provide the plaintiff with food
both the plaintiff and defendant, and under the facts, it is impossible
to say that the plaintiff was not a party, and a
partner in the care of the defendant.
It is also noted that the defendant was the owner of the restaurant
of defendant, and that the plaintiff was the defendant's wife and
made no objection whatever to any of the defendant's actions as to the
defendant's business and the plaintiff's. The plaintiff and defendant
of error cannot be sustained on this point.

7.

error in giving plaintiff's instructions, and on the question of injury and medical expense the Court erred in light of the testimony given on behalf of the plaintiff for medical expense in giving the following instruction: "The Court instructs the Jury that if you find the issues for the Plaintiff, Joseph Leonard, it is your duty to assess his damages and in arriving at whatever damages, if any, he may be entitled to, you have a right to and should take into consideration if shown by the evidence the nature and extent of Plaintiff's injuries, if any, as a result of such injuries; his pain and suffering, if any, as a result of such injuries, and from all the facts and circumstances in evidence, award to the Plaintiff, Joseph Leonard, such sum as you find from the evidence to be reasonable and fair compensation for damages sustained or which may be sustained by him in the future, if any, as a direct and proximate result of said injuries." It is claimed that the instruction was erroneous and misleading because the evidence in this case clearly shows that the medical and hospital expense was not charged to the plaintiff in the case, and that this was the only instruction given in regard to damages. This instruction does not make any reference whatsoever to medical or hospital expenses, so the jury could not be misled by the giving of this instruction.

It is insisted that the Court erred in the admission of incompetent, improper and irrelevant testimony on the part of the plaintiff. Appellant's argument is directed to the weight and not the

error in giving Plaintiff's instructions, and in the presentation of
jury and medical evidence and to be held in favor of the defendant
given on behalf of the Plaintiff for medical evidence in this case
following instruction: "The Court instructs the jury that if you
find the law as stated by the Plaintiff, Joseph Leonard, in the case of
to assess the damages and in applying the evidence, if any,
he may be entitled to, you have a right to and should to the law
evidence is shown by the evidence the nature and extent of Plaintiff's
injuries, if any, as a result of such injuries; the pain and
suffering, if any, as a result of such injuries, and from all the
facts and circumstances in evidence, award to the Plaintiff, Joseph
Leonard, such sum as you find from the evidence to be reasonable and
fair compensation for damages sustained or to be sustained by
him in the future, if any, as a result of such injuries, if any,
injuries." It is ordered that the instruction be given as above.
Whatsoever because the evidence in this case clearly shows that the
medical and hospital charges are not charged to the Plaintiff in this
case, and that the only instruction given in this case is that
this instruction does not in any reference whatsoever to medical or
hospital charges, and the jury could not be misled by the fact of
this instruction.

It is ordered that the Court enter its decision on the
dispositive, Joseph and Leonard's testimony on the day of the
Plaintiff. Plaintiff's request is directed to the court and not the

8.

admissibility of the evidence of the plaintiff. We find no error in the admission of plaintiff's evidence.

It is insisted that the Court should have directed a verdict in favor of the defendant at the close of the plaintiff's evidence, and at the close of all of the evidence, because the plaintiff failed to prove any negligence on the part of the defendant, and also that the plaintiff failed to prove that he was in the exercise of ordinary care for his own safety at the time the accident occurred. The evidence shows that at the time of the accident, the streets of the City of Peoria were covered with ice; that the defendant with the plaintiff, and the other two parties, heretofore mentioned, were riding with the defendant in his coupe; that the plaintiff was sitting at the right of the defendant on the front seat, and the other two parties in the rear; that the car had skidded several times, and according to the plaintiff, the defendant was driving between 30 and 40 miles an hour on this icy street when the car skidded, went over the curbing and struck a tree, and the plaintiff was injured. The defendant denies that he was driving at this rate of speed, but claims he was driving at a reasonable and ordinary speed. This was a question of fact for the jury to decide. If they believed that the defendant was driving at the approximate speed at which the plaintiff testified, the jury would certainly be justified in finding that this was an excessive rate of speed, considering the icy condition of the street. The plaintiff was riding in the front seat with the driver of the car, and had

admissibility of the evidence in the case. It is found in favor of the admission of Plaintiff's evidence.

It is further found that the evidence is sufficient to support a verdict in favor of the Plaintiff at the trial of the case. The evidence, and of the fact of all of the evidence, shows that the Plaintiff failed to prove any negligence on the part of the defendant, and also that the Plaintiff failed to prove that he was in the vicinity of ordinary care for his own safety at the time the accident occurred. The evidence shows that at the time of the accident, the streets of the City of New York were covered with ice; that the defendant, Plaintiff, and the other two parties, Defendant's witnesses, were driving with the defendant in the company; that the Plaintiff was driving at the right of the defendant on the front seat, and had other two parties in the rear; that the car had several several doors, and according to the Plaintiff, the defendant was driving between the car and the Plaintiff on this last street when the car stopped, and the Plaintiff was driving at a speed of a foot, and the Plaintiff was driving. The evidence shows that he was driving at a speed of a foot, and the Plaintiff was driving at a reasonable and ordinary speed. This was a question of fact for the jury to decide. It was believed that the defendant was driving at the appropriate speed at which the Plaintiff testified, and that would testify if he testified in the case that he was on a reasonable speed of speed, considering the top condition of the street. The Plaintiff was riding in the front seat with the driver of the car, and the

nothing to do with its operation. Whether he did something that he ought not to have done, or did not do something that he should have done, was a question of fact for the jury to decide from all the evidence in the case. We cannot say that the jury's verdict in this particular matter was against the manifest weight of the evidence, so their decision will not be disturbed by us.

At the conclusion of the evidence and before the arguments of counsel to the jury, the defendant asked the Court to submit to the jury the following interrogatory: "Do you find from the evidence at the time of the accident, that the plaintiff, Joseph Leonard, was an employee in the employ of the defendant, Wayne Stone?" The Court refused to submit the interrogatory to the jury, but marked the same "refused." It is now insisted that this was reversible error by the Court's refusal to give the special interrogatory. Just why the trial court refused to submit this interrogatory, we do not know, and we think that the Court could properly have submitted this question of fact to the jury, but unless the defendant has been prejudiced in some manner by the refusal to submit this interrogatory, and that the answer to this question would have resulted in a different verdict for the defendant, he has not been prejudiced. The defendant testified positively that he never had employed the plaintiff, or that he was employed the evening of the accident. The plaintiff testified positively that he had been employed before the time of the accident,

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and was employed that evening, and as before stated, the written statement of the defendant showed that he had been so employed, and the other two witnesses, the passengers in the car, corroborated the plaintiff in his statement. This was a question of fact that was squarely presented to the jury for their determination without being given the special interrogatory. We do not think the Court erred in refusing to give this special interrogatory.

There are other assignments of error, but our conclusion that the plaintiff was a passenger, and not a guest in the defendant's car at the time of the accident in question, fully disposes of the other contentions of the appellant. On the whole, we think that the plaintiff and defendant had a fair and impartial trial, and that the judgment of the trial court should be affirmed.

Affirmed.

and was employed at the time, and as a result thereof, the witness
statement of the defendant witness that he was not so employed, and
the other two witnesses, the witnesses, in the act, corroborated
the plaintiff's statement. This is a question of fact and
was squarely presented to the jury for their determination, and
being given the special instructions, we do not think the court
erred in refusing to give the special instructions.
There are other assignments of error, and the conclusion
that the plaintiff was a resident, and was a partner in the corporation,
and at the time of the accident in question, which disposed of the
other questions of the complaint. On the whole, we think that the
plaintiff and defendant had a fair and impartial trial, and that the
judgment of the court should be affirmed.

Affirmed.

313 I.A. 150

Abstract

Gen. No. 9729.

Agenda No. 28.

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT
OCTOBER TERM, A. D. 1941.

493
31

W. J. VIERCK and HERBERT H. VIERCK,)	
co-partners, doing business under the firm)	
name and style of "W. J. VIERCK & SON,")	
Plaintiffs-Appellants,	)	Appeal from
	)	Circuit Court,
vs.	)	Winnebago County.
)	
EDITH A. LINDBERG,)	
Defendant-Appellee.)	

WOLFE,-- P. J.

This is an appeal from the Circuit Court of Winnebago County, Illinois, which dismissed the complaint of the plaintiffs in which they seek a lien on property of the defendant for hardware of the value of \$450.00 allegedly ordered by the defendant and furnished to her by the plaintiffs. The defendant, Edith A. Lindberg, was the owner of the property described in the petition on which she was erecting a residence. It is claimed by the plaintiffs that she ordered from them certain hardware to be used in the construction

2.

of the building. This, the defendant flatly denies. The hardware, which is the subject-matter of this dispute, was known as, a special order, and was made especially for the house of the defendant. The factory shipped the material to the plaintiffs who delivered it to the property of the defendant without the defendant's knowledge. The house was in the course of construction. The hardware was in a package and was placed in the building by some one for the plaintiffs, and was found by the defendant's husband the next morning before the workmen came. The hardware was immediately returned to the plaintiffs and was never used in the erection of the building. Before the hardware was taken to the building, one of the plaintiffs had a telephone conversation with the husband of the defendant in which he notified the plaintiffs that they would not use any of the hardware furnished by the plaintiffs, as they had procured their hardware for this house at another place. It is uncontradicted that at the time the hardware was delivered by the plaintiffs to the property of the defendant, they had actual knowledge that the hardware would not be used by the defendant in the erection of the building.

The abstract contains an opinion rendered by the trial court at the time he denied the plaintiffs' petition for a Mechanic's Lien on defendant's property. We have considered this opinion, and we think that it states the law in a concise and plain manner. As before stated, at the time the plaintiffs delivered this material to the home

3.

of the defendant, they knew that the same would not be used by the defendant in the construction of this new building. We agree with the trial court that the plaintiffs have not shown a state of facts which entitles them to a Mechanic's Lien. The judgment of the Trial Court will be affirmed.

Affirmed.

of the defendant, that he was not a party to the
defendant in the commission of the crime charged. The court
the trial court that the defendant had not a party to the
which entitles him to a judgment of acquittal. The court
Court will be affirmed.

Attorney General
The People of the State of New York
County of New York
In SENATE CHAMBER, City of New York
I, the undersigned, Clerk of the Court of Sessions
for the County of New York, do hereby certify that
the within and foregoing is a true and correct copy
of the record of the proceedings in the above
entitled case, as the same appears from the
records of the Court of Sessions for the County
of New York, and that the same are true and
correct copies of the original records of the
Court of Sessions for the County of New York.
In testimony whereof, I have hereunto set my
hand and the seal of the Court of Sessions for
the County of New York, at the City of New York,
this _____ day of _____, 19____.

Abstract

313 I.A. 151¹

Agenda No. 31.

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT
OCTOBER TERM, A. D. 1941.

503
32

WILLIAM ZAWADA, Administrator of
the Estate of John Zawada, deceased,
Plaintiff-Appellee.

vs.

FRANK O. LOWDEN, JAMES E. GORMAN and JOSEPH B. FLEMING, Trustees of the Estate of the Chicago, Rock Island & Pacific Railway Company, a corporation,

Defendants-Appellants.)

Appeal from
Circuit Court,
Rock Island County.

WOLFE, -- P. J.

William Zawada, Administrator of the Estate of John Zawada, deceased, started this action at law in the Circuit Court of Rock Island County, against Frank O. Lowden, James E. Gorman and Joseph B. Fleming, Trustees for the Chicago, Rock Island & Pacific Railway Company, a corporation, to recover damages for the death of John Zawada. The pleadings consisted of one count filed by the plaintiff in which it is alleged that the defendants who are the

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Vol. 10. 151

Gen. No. 151

RECEIVED COURT OF COMMONS
SIXTH DISTRICT
MONTREAL, P. Q. 1901.

WILLIAM ZAWADA, Administrator of
the Estate of John Zawada, deceased,
Plaintiff-Appellant,

vs.

FRANK O. LOWMEYER, JAMES A. LOWMEYER,
JOSEPH B. FIDELITY, Trustees of the
Estate of the Chicago, Rock Island
& Pacific Railway Company, a cor-
poration,
Defendants-Appellees.

Appeal from
Circuit Court,
Rock Island County.

NOTE -- P. 1.

William Zawada, administrator of the estate of John
Zawada, deceased, appeals from a judgment of the Circuit Court of
Rock Island County, entered upon a verdict in favor of the
Joseph B. Fidelity, Trustees of the Chicago, Rock Island & Pacific
Railway Company, a corporation, and against the estate of John
Zawada. The plaintiff claims that the defendant was the
plaintiff in the case and that the defendant was the

2.

Trustees of the Rock Island Railway Company, owned and operated a railroad through the City of Moline, Illinois; that through the negligence and carelessness of the defendant company, the plaintiff, while in the exercise of ordinary care and caution for his own safety, in attempting to cross the tracks of the defendants, was struck by a passenger train owned by the defendants and plaintiff's intestate was killed. The complaint charges numerous acts of negligence on the part of the defendants.

The defendants filed their answer in which they admitted that they were the trustees, as alleged in the complaint, and were operating trains, as charged at the time the accident occurred. They denied any and all acts of negligence on their part that in any way contributed to the accident in question, and denied that the plaintiff's intestate was in the exercise of due and ordinary care for his own safety at the time he was killed, and charge that it was on account of his negligence that the accident occurred. The case was tried before a jury who found the issues in favor of the plaintiff, and assessed damages at \$4,500.00. At the close of the plaintiff's case, the usual motions for peremptory instructions were filed asking the Court to direct a verdict in favor of the defendants. This motion was overruled, and at the close of all of the evidence the motion was renewed, but denied. The motion for a new trial and for judgment notwithstanding the verdict was also overruled, and the

trustees of the Rock Island Railway Company, owned and operated
railroad through the City of Chicago, Illinois; that the
negligence and carelessness of the defendant company, the plaintiff,
while in the exercise of ordinary care and caution for its own safety,
in attempting to cross the track of the defendant, was negligent
passenger train owned by the defendant and plaintiff's negligence
was killed. The complaint charges various acts of negligence on
the part of the defendant.

The defendant's answer in which they admitted
that they were the trustees, as alleged in the complaint, and were
operating trains, as alleged in the complaint, and that the accident occurred.
They denied any and all acts of negligence on their part and in any
way contributed to the accident in question, and denied that the
plaintiff's negligence was in the exercise of care and ordinary care
for his own safety at the time he was killed, and denied that he was
on account of his negligence that the accident occurred. The case was
tried before a jury who found the facts in favor of the plaintiff,
and assessed damages at \$100,000. At the close of the plaintiff's
case, the usual motions for judgment and instructions were filed and
the Court to direct a verdict in favor of the defendant. The
motion was overruled, and at the close of all the testimony the
motion was renewed, but denied. The motion for a new trial and for
judgment notwithstanding the verdict was also overruled, and the

3.

Court entered judgment in favor of the plaintiff for \$4,500.00. It is from this judgment that this appeal is prosecuted.

At the request of the plaintiff, the Court gave to the jury the following instruction: "(3) The Court instructs the Jury that it was the duty of the defendants in approaching the crossing in the plaintiff's complaint set forth, either to ring a bell of not less than thirty pounds weight or sound a whistle, at a distance of at least eighty rods from said crossing, and that such duty to ring such bell or to sound such whistle continued until the crossing was reached, and if you find from the evidence that the plaintiff's intestate suffered injuries from which he died, as charged in the complaint, and that the defendants failed in the duty to ring or whistle as heretofore stated, and that in failing to perform their said duty in this regard, the defendants were negligent and that such negligence was the proximate or immediate cause of the injuries to the plaintiff's intestate from which he thereafter died and for which plaintiff sues them, you will find the issues for the plaintiff provided you further believe from the evidence that the plaintiff's intestate at the time and place of the injuries was in the exercise of ordinary care for his own safety."

It is seriously contended by the appellants that the giving of this instruction was reversible error, as there is no charge in the complaint that the defendants had violated any statute by not ringing

4.

the bell, or blowing the whistle, as stated in this instruction. The charge of negligence on which this instruction was based is Paragraph I of the complaint, which is as follows: "That it was the duty of the defendants, by their servants and agents, to give warning of the approach of said train by the ringing of a bell, or the blowing of a whistle, but that the defendants failed to give such warning and were negligent in that respect." In the case of Chicago, Burlington & Quincy Railroad Company vs. Harry G. Well, 42nd Ill. App. at Page 26, this Court had occasion to decide the exact question that is now presented by this appeal. In that case the charge of negligence against the railroad company was exactly the same as in the present one, namely, the failure to give warning of the approach of the train by the ringing of a bell, or of the blowing of a whistle. In the Burlington Railroad case we there held that the charge of negligence was a breach of a common law liability and not a statutory one, and the giving of an instruction that contained the charge that it was the duty of the railroad company to ring a bell, or sound a whistle continuously for a distance of eighty rods before reaching the highway crossing in question, was improper and reversible error because the declaration did not charge any such violation of the law, as provided in the statute.

The instruction complained of is mandatory, as it directs a verdict in favor of the plaintiff, if from the evidence, they believe that the defendants failed upon approaching the crossing, either to

ring a bell of not less than thirty pounds in weight, or sound a whistle of a distance of at least eighty rods from said crossing, and if the jury believed from the evidence that the defendants failed in this statutory duty, and that that failure was the proximate cause of the injury to the plaintiff, and the plaintiff was in the exercise of due care and caution for his own safety, then they should find the defendants guilty. When the plaintiff sets out in his complaint the negligent acts of the defendants relied on as a basis of recovery, he must establish those negligent facts and cannot recover by reason of negligent acts of the defendants not averred in the declaration, as a ground of recovery even though the acts proven show the defendant was guilty of the negligence which caused his injury. *Buckly vs. Mandell Brothers* 333 Ill. Page 368; *Chicago City Railroad Company vs. Bruley* 215 Ill. 464. It is our conclusion that the instruction in question was fatally defective and should not have been given, as the charge in the complaint was a violation of a common law duty, and the instruction was applicable only when a violation of a statutory duty was charged, and it placed a responsibility upon the defendants that was not charged in the complaint.

The appellants complain of the Court's failure to give their refused instruction No. 5. Why this instruction was refused, we do not know. The trial court may have been of the opinion that it was covered by other instructions, but it seems to us that this

ring a bell or not had been decided in favor of the
 whistle of a distance of 100 feet being the limit.
 and if the jury believed that the defendant was
 in this station house, and that the bell was the means
 of the injury to the plaintiff, and the defendant was the cause
 of the error and accident to the car, then the jury should
 find for the plaintiff. But the defendant says that it was
 negligent acts of the defendant which caused the injury,
 he must establish that the defendant was negligent and cannot recover if
 of negligent acts of the defendant was caused by the plaintiff,
 as a ground of recovery even though the plaintiff was the defendant
 was guilty of the negligence which caused the injury. *Smith vs.*
Hendell Brothers and Co., 100 Ill. 2d, 100 Ill. 2d, 100 Ill. 2d,
vs. Bristle and Co., 100 Ill. 2d, 100 Ill. 2d, 100 Ill. 2d,
 in question the liability of the defendant for the injury, as
 the cause of the injury was a violation of the law,
 and the plaintiff was injured, and the defendant was liable
 for duty was caused, and the plaintiff was injured, and the
 defendant was liable for the injury. *See also*
 the plaintiff's complaint to the court, and the
 their testimony, and the fact that the plaintiff was injured,
 we do not say, the fact that the plaintiff was injured, and
 was covered by the defendant, and the plaintiff was injured.

6.

instruction, if it were not covered by other instructions, could very well have been given. Appellants make complaint of plaintiff's given instruction No. 2 and No. 4. Each of these instructions fail to say that the negligence of the defendants was limited to that charge in the complaint, but left to the jury to speculate as to what the negligence might be. We think that the instructions should have contained a clause limiting the negligence of the defendants to that charged in the complaint.

The major parts of appellants' and appellee's brief are devoted to the facts in the case. It is seriously contended by the appellants that the court erred in not directing a verdict in their favor, as there is no evidence ~~of~~ showing any negligence on the part of the defendants, and the evidence of the plaintiff shows as a matter of law, that the deceased was not in the exercise of due care and caution for his own safety at the time he was killed. We do not express any opinion whatsoever in regard to the evidence in the case, as the same will have to be reversed and remanded for a new trial, for other reasons.

For the error of the Court in giving plaintiff's instructions Nos. 2, 3 and 4, the judgment of the Trial Court is hereby reversed and the cause remanded.

Reversed and cause remanded.

Instruction, it is well known to those responsible, could very well have been given. Instructions were furnished to the various Instruction No. 2 and No. 3. It is not known whether or not that the negligence of the defendant was limited to that scope in this connection, and that in the past, in connection with the negligence, the defendant was negligent in the past. The defendant was negligent in the past.

The reason for the negligence was that the defendant was negligent in the past. It is well known to those responsible, could very well have been given. Instructions were furnished to the various Instruction No. 2 and No. 3. It is not known whether or not that the negligence of the defendant was limited to that scope in this connection, and that in the past, in connection with the negligence, the defendant was negligent in the past.

for other reasons. The reason for the negligence was that the defendant was negligent in the past. It is well known to those responsible, could very well have been given. Instructions were furnished to the various Instruction No. 2 and No. 3. It is not known whether or not that the negligence of the defendant was limited to that scope in this connection, and that in the past, in connection with the negligence, the defendant was negligent in the past.

2713-151

313 I.A. 151²

GEN. NO. 2736

AGENDA NO. 44

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

October Term, A.D. 1941.

DEANA CRUMP,

Appellee,

vs.

MONTGOMERY WARD &
COMPANY, INC.,

Appellant.

APPEAL FROM THE
CIRCUIT COURT OF
LAKE COUNTY.

DOVE, J.

Appellee recovered a verdict and judgment for \$1900.00 against appellant in the circuit court of Lake County for injuries sustained by reason of the sudden closing of one of the entrance doors of appellant's store at Waukegan, whereby she was struck in the back by a horizontal metal bar on the door as she was passing through the doorway. She was severely injured in the left sacro-iliac joint and the coccyx bone, necessitating extensive treatment and the use of plaster casts. The extent of her injuries is not questioned and the judgment is not claimed to be

iv

100

480

excessive. It is insisted by counsel for appellant, however, that the trial court erred in overruling appellant's motions for a directed verdict and for judgment notwithstanding the verdict.

Counsel for appellee contends that under the evidence the doctrine of *res ipsa loquitur* applies, and that even if that doctrine is not applicable, there is sufficient evidence to sustain the charges of negligence on the part of appellant as alleged in the complaint, while counsel for appellant takes the opposite stand.

The evidence discloses that on December 17, 1938, between 12:00 and 12:30 P. M., plaintiff, with her husband and other relatives, went to appellant's store to do some Christmas shopping. The store is on the east side of Genesee Street. There are three show windows in the front of the store, one on the north, one on the south, and a wide one in the center. On the sides of the center window are passage ways which meet behind it. There are no doors at the street line. On the east side of the passage way behind the center window are two pairs of double doors about twenty-five feet back from the sidewalk. The doors are of plate glass with metal frames surrounding the glass. They weigh about two hundred pounds each, and open outward toward the street. There are two horizontal metal bars on each side of each door, the lower one of which is about thirty-seven and one-half inches above the floor. Each door is equipped with hydraulic hinges, designed to operate as a check when the doors are closing. On each door was a metal door stop or holder of the plunger type. To hold the door open, the plunger is pressed down and engages the floor. The plunger has some material on the bottom designed to cause it to adhere to the floor. A trigger on the side of the stop three and one-half to four inches above the bottom of the door allows the plunger to be released and an inner spring retracts it. A short distance east of these doors there are two other pairs of double

doors leading into the store. They also open outward. The passage way slopes downward from the outer doors to the street, and when the doors are open the outer edge of the door is about one inch above the floor.

Appellee and her husband testified that at the time of the accident, the outer doors were open and the inner doors were closed. She stated that the outer doors were hooked open at the bottom, and he testified they were kept open by the foot plungers. The evidence shows there was a crowd going in and out of the store. Appellee testified that as she and her husband approached the south pair of the outer doors, she was a little ahead of him; that she started in on the right hand side, and a woman coming out of the store forced her over to the center and went between her and her husband; that just at that time the north door of the south pair suddenly swung shut and the horizontal bar hit her in the back, knocking her forward toward / the inner doors, the bars of which she grasped to support herself; that her hands did not touch the door which hit her, and it closed between her and her husband. His testimony corroborates hers. He also testified that ten or fifteen minutes after the accident, the plunger of the door stop was partly down below the bottom of the door, almost dragging, but not touching the floor. None of this testimony was contradicted.

Homer H. Schwartz, an employee of appellant, in charge of the third floor, testified that after the accident, he examined the doors about 1:00 or 1:30 o'clock. He described them and their equipment and operation, as above stated. He stated that the projecting trigger on the door stop is just wide enough to catch with one's

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foot and is not right in the lane of customers going in and out; that if some one hit the projection, it might cause the door to close one-quarter of the arc; that "approximately a few minutes" before the injury, he observed this door and at that time it was shut. He testified that when he examined the doors, they opened easily, but did not close quickly, and continued: "With respect to the operation of the door on that day, after you opened it and then let go of it, it would swing free one-quarter of the total arc that was necessary to close, and the rest of the way it was checked in there by the door checks built into the door." He further testified that after examining the doors, he visited appellee at her home and had her fill out a report; that she told him that some one had let go of the door and that it struck her. Appellee denied making the statement. The report she filled out was not introduced in evidence.

Mr. Schwartz further testified that the store manager and assistant manager at the time of the accident were no longer connected with the company and were not in the vicinity to his knowledge. Appellant made no showing of any effort to procure the attendance of either of them as witnesses, or that they were not available. This witness also testified the store had nobody in charge of maintenance, and it was not his duty to look after the doors on the main floor; that the particular doors to his knowledge had been in use ever since the store opened in December, 1937, and he did not know whether they had been in use for a number of years prior to that time or not.

Kenneth Lee, connected with a hardware company, testified that he was familiar with the door holder and door check used on the door of appellant at the time of the accident; that these particular types of door holders and checks have been in use for twenty and twenty-five years respectively, and are the customary and approved types. He

foot and is now in the line of the... if some one else... on the... injury... died that... those... door on the... swing free... and the rest of the... built into the... doors, he... that the... struck her... killed... 11. ... assistant... with the company... last... of them... also... was not... particular... store... been in... Kenn... he... of... of... years...

described their operation in detail. He and Mr. Schwartz are the only witnesses who testified on behalf of appellant. Neither of them nor anyone else testified that either the door holder or the door check was in efficient working condition on the day of the accident, or that either the door holder or door check was ever inspected by or for appellant. It is common knowledge that any mechanical contrivance does not constantly remain in efficient working order, and among those familiar with hydraulic door checks, it is recognized that they need periodical adjustments or repairs. Not only is this true, but in this case, the evidence is that the door swung freely in the first quarter of the closing arc, and was checked only through the remainder of its journey. The evidence is uncontradicted that it swung with such force so that when it came in contact with appellee it knocked her forward toward the inner doors and severely injured her. No door in safe operating condition could do that, whether the closing was caused by the inopportune release of a defective door holder, or from a release of the opened door by another party. If any inspection of the doors had been made, that fact was one peculiarly within appellant's knowledge, and its failure to produce any evidence on that point, gives rise to the presumption that no inspection was ever made. (Belding v. Belding, 358 Ill. 216; Hooper v. Talbot, 343 Id. 590). This presumption is augmented by the testimony that appellant had nobody in charge of maintenance. While a party operating a business to which the public is invited is not an insurer of the safety of patrons, nevertheless, it is his duty to use reasonable care to keep the premises in a reasonably safe condition so that invitees will not be injured by reason of any unsafe condition of the premises, (Devaney v. Otis Elevator Co. 251 Ill. 28; Antibus v. W. T. Grant Co., 297 Ill. App.

[illegible]

363), and a failure to do so is manifestly actionable negligence where an injury results therefrom.

It is to be noticed that the testimony of appellee and her husband is that the door was propped open by the door holder as they approached it. Nobody is shown to have contacted the door in any manner. If the door stop was in proper working order and the plunger was properly depressed, it would have continued to hold the door open. When appellee's husband inspected it ten or fifteen minutes after the accident, the plunger was depressed a little below the bottom of the door. If the door holder was in operating condition and the trigger had been tripped, the internal spring would have drawn the plunger up. The door holder is not for the use of customers to be operated by them in entering or leaving the store, like the use of doors. It is ^afacility of the store intended to be exclusively controlled and operated by the management of the store. The fact that the particular door and the other outer doors were all propped open, tends to show they were propped open by appellant or its agent. In so doing, it owed the same duty to its invitees to use reasonable care for their safety as it did for providing safe equipment. The conclusion is inescapable that the plunger was not sufficiently depressed or that some defect in the door holder prevented it from continuing to hold the door open. A hypothesis that the trigger may have been struck by some passerby is not available to overcome this conclusion, for the reason that if the door holder was in proper operating condition such a contact would have caused the plunger to be retracted, whereas it was partly down. On the subject of intervention by a third party, the ~~Supreme~~ Court of Missouri in *Hart v. Emery, Bird, Thayer Dry Goods Co.*, ²³³ Mo. app. 312, 118 S.W. 511, said the requirement that the instrumentality be under

383) 1911 - This is the only one of the series.

There is no other evidence.

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the management and control of the defendant does not mean, or is not limited to, actual physical control, but refers rather to the right of control at the time the negligence was committed; and consequently, the mere possibility that some third person might have been responsible for the negligent condition of the instrumentality causing the injury does not prevent the rule from applying. Practically the same doctrine appears in 45 C. J. 1212, and in *Ven Horn v. Pacific Refining Co.*, 27 Cal. 2d 105, 148 Pac. 951.

The doctrine of *res ipsa loquitur* is, that whenever a thing which produced an injury is shown to have been under the control and management of the defendant, and the occurrence is such as in the ordinary course of events does not happen if due care has been exercised, the fact of injury itself will be deemed to afford prima facie evidence to support a recovery in the absence of any explanation by the defendant tending to show that the injury was not due to his want of care. (*Bollenbach v. Bloomenthal*, 341 Ill. 539.) One of the essentials of the doctrine is that it must appear that the one whose negligent act has caused the injury had such control and management over the instrumentality causing the injury that the defendant would be in a better position to explain the cause of the act causing the injury than the person injured, and the burden is cast on the defendant to explain it and show it was not his negligence that caused the injury. (*Wilson v. East St. Louis & Interurban Water Co.*, 295 Ill. App. 603.) In evoking the doctrine, it must appear that the agency causing the accident is solely under the management of the defendant, for if it is partly under the management of the plaintiff, then the doctrine could not be invoked. (*Odum v. Corn Products Ref. Co.*, 173 Ill. App. 348.) In this case, it is clear that the agencies causing the accident were the door check and

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the door holder. These were under the exclusive management and control of appellant. The door itself was merely the weapon operated by the two agencies. It was not the cause of the accident. The two instrumentalities which caused the accident and the keeping of the door propped open were under the management and control of appellant. Swinging door cases cited by appellant, have no application here. In those cases, the doors are operated by the public who thus take part in their management and control. No such condition existed here at the time of the accident. In our opinion, the facts in this case bring it within the doctrine of *res ipsa loquitur*. The claim that appellee was bound to show the dangerous condition had existed for such a time that appellant should have notice of it is not available here, where the presumption is that no inspection was ever made by appellant at any time, and the record shows it had no one who was in charge of maintenance. These factors show such negligence as cannot be excused by the claim that the condition may not have been of such duration as to constitute notice. The due care of appellee is not questioned.

Each of appellant's motions imposes the burden upon it of showing that the evidence, taken most strongly in favor of appellee, did not make a *prima facie* case. Where there is evidence in the record fairly tending to support the allegations of the complaint, the case should be submitted to the jury. All that the evidence tends to prove and all just inferences to be drawn from it in appellee's favor must be taken as true. What is the proximate cause of the injury is ordinarily a question of fact for the jury. (*Holloy v. Chicago Rapid Transit Co.*, 335 Ill. 164.) Even if it be conceded the doctrine of *res ipsa loquitur* does not apply here, the evidence in appellee's

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favor was sufficient to require the issues to be submitted to a jury. The testimony in behalf of appellant not only did not overcome the prima facie case, but rather strengthened it. The trial court correctly denied each of these motions of appellant and the judgment will be affirmed.

Judgment affirmed. '

favor the solution of the problem of the future of the
country. The government in power of the United States has not
overcome the great task of the future of the country. The
trial court has decided that it is not possible to maintain
and the judgment will be affirmed.

Respectfully,
J. Edgar Hoover

313 2000
3-15-42
GEN. NO. 9662

54 338
AGENDA NO. 1

IN THE APPELLATE COURT OF ILLINOIS,

SECOND DISTRICT

OCTOBER TERM, 1941.

313 I.A. 259

PEOPLE OF THE STATE OF
ILLINOIS,

Defendant in Error,

vs.

HUGO MATTEI,

Plaintiff in Error.

WRIT OF ERROR TO COUNTY COURT
OF WILL COUNTY.

HUFFMAN - P.J.

Plaintiff in error was convicted in the County Court of Will county upon two counts of an information charging him with violation of certain portions of the Medical Act (Ch. 91, Sec. 16 1, Para. 24). Fine was imposed upon each of the two counts. The defendant has prosecuted this writ of error to reverse the judgments.

The complaining witness was one Charlotte Hermes. She was in the employ of the Department of Registration and Education of the State of Illinois, and designated as an Inspector. She received an assignment to investigate plaintiff in error. Pursuant thereto, she went to his office where she detailed certain pains and bodily afflictions from which she claimed to be suffering. She gave a fictitious name and address. The plaintiff in error proceeded with an examination of the investigator, which was fol-

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INDEX: METEOROLOGICAL

Detained in Prison

BY

HUGO WATTEI.

PLATE 19 IN EXIST.

THREE WITNESSES OF FORCE TO THEM
WITNESS ALL TO

1. 3 - KAMFZUFN

The defendant has misstated this right of error to reverse the
16 1, Para. 24). Fine was imposed upon each of the four counts.
violation of certain portions of the Medical Act (Ch. 72, Sec.
Will county upon the count of an information charging the same.
Plaintiff in error was convicted in the County Court at
Indigments.

[illegible]

lowed by a treatment.

He advertised himself as a practitioner of naprapathy, which is a method of massage. He is a native of Italy, and prior to leaving that country, studied medicine for two years with the view of becoming an officer in the medical corps of the Italian Navy. After coming to this country, he attended an institution in Chicago, where he studied the science of massage, and subsequently engaged in the practice of naprapathy in the City of Joliet.

He administered several treatments to the investigator over a period of time, which involved the acts complained of. It would serve no good purpose to detail the same here. They presented a question of fact to the jury, and if the jury believed them, they constituted the violations as charged. The investigator went to the office of plaintiff in error with a predesigned plan of bringing about the situation which resulted. The jury had the opportunity to pass upon the credibility of the evidence, and the trial court the advantage of seeing and hearing the witnesses. The record has been carefully reviewed. Oral argument was had before the court. In the state of the record, the court does not feel justified in reversing the judgments, and the same are therefore affirmed.

Judgments affirmed.

loved by a treatment.

He afterwards himself as a practitioner of medicine, which

is a method of medicine. He is a native of Italy, and before to

leaving that country, studied medicine for two years at the

of becoming an officer in the medical corps in the Italian army.

After coming to this country, he attended an institution in Boston,

where he studied the science of surgery, and subsequently resided

in the practice of surgery in the city of Lowell.

He afterwards received treatment in the hospital over

a period of time, which involved the sale of his property. It would

serve no good purpose to detail the same here. After spending a

question of fact to the jury, and if the jury believed him, they

constituted the violations as charged. The investigation went to

the office of plaintiff in error with a recommended plan of doing

ing about the situation which resulted. The jury had the opportunity

to pass upon the credibility of the evidence, and the trial court

the advantage of seeing and hearing the witnesses. The record has

been carefully reviewed. On all grounds we had before the court.

In the state of the record, the court does not feel justified in

reversing the judgment, and the case will be affirmed.

On grants affirmed.

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GEN. NO. 9682

AGENDA NO. 3

IN THE APPELLATE COURT OF ILLINOIS,
SECOND DISTRICT

OCTOBER TERM, 1941. 313 I.A. 260¹

THE PEOPLE OF THE STATE
OF ILLINOIS,

Defendant in Error,

vs.

DENNIS KELLY,

Plaintiff in Error.

}
}
}
WRIT OF ERROR TO CIRCUIT COURT
OF WILL COUNTY.
}

HUFFMAN - P.J.

Plaintiff in error and one Evelyn Welch were convicted of conspiracy before a jury in the Circuit Court of Will county.

A fine was assessed against the defendant Welch. Plaintiff in error received a fine and jail sentence, from which he prosecutes this writ of error.

The defendant below was charged with conspiracy to obstruct the administration of justice, in that he conspired to corrupt a juror drawn upon the regular panel, which was to try a criminal case then pending against him.

Plaintiff in error assigns four grounds for reversal, namely; that the court erred in excluding proper evidence offered; that the court erred in restricting the examination of the defendants; that the court erred in the matter of instructions, and particularly in the giving of number sixteen; and that the court erred in over-

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January 11, 1900

Gen. No. 200

IN THE SUPREME COURT OF ILLINOIS

SECOND DIVISION

DOCKET NO. 1011. 2131A. 280

THE PEOPLE OF THE STATE
OF ILLINOIS,

Defendant in Error,

vs.

DENNIS KEENE,

Plaintiff in Error.

WIT OF COURT IN SENATE CHAMBER
OF ILLINOIS.

HUFFMAN - P. L.

Plaintiff in Error and Defendant in Error were convicted of
conspiracy before a jury in the Circuit Court of this county.
A fine was assessed against the defendant before the jury.
In error removed to this and this court, that when he was
out of this court at error.

The defendant was charged with conspiracy to obstruct
the administration of justice, in that he conspired to prevent a
juror from going to the court house, and to keep a juror
out of the court house.

Plaintiff in Error assigns four grounds for reversal, namely:
that the court acted in violation of the constitution; that
the court acted in violation of the constitution of the defendant;
that the court acted in violation of the constitution of the defendant;
in the giving of evidence; and that the court acted in error.

ruling motion for new trial. We have carefully read the argument of counsel for plaintiff in error, bearing upon the question of the first two assignments, that the court improperly excluded evidence, and that the court improperly restricted the examination of defendants, as well as the record in reference thereto. We do not perceive wherein plaintiff in error was prejudiced in the above respects, and are not inclined to disturb the judgment upon either of those points.

Instruction number 16 is set out in the brief of plaintiff in error, to which he interposes assignment number three. It has to do with the testimony of an accomplice, and the rule relative thereto. In support of his objection to this instruction, plaintiff in error urges the case of *People v. Rongetti*, 338 Ill. 56, 65. We do not think the jury was prejudiced by the giving of this instruction. It advised them that the law was that the testimony of an accomplice was liable to grave suspicion, and that they should always act upon such testimony with great care and caution, and subject it to careful examination in the light of all the other evidence in the case. We think this duly advised the jury as to the rule and if, under such circumstances, they saw fit to give credibility to such testimony, it was within their province. No argument is made with respect to any other instruction.

The evidence was brief, and presented an issue of fact for the jury, which they have passed upon. This court is not inclined to disturb the verdict.

The judgment is therefore affirmed.

Judgment affirmed.

AGENDA NO. 32

— 313 I.A. 260²

WALTER JOHNSON, Administrator of
the Estate of Doris Johnson, de-
ceased.

V.

FRANCIS S. McKNIGHT.

Appellant.

DOVE, J.

This appeal is from a judgment of the circuit court of Winnebago County for \$4000.00, rendered on a verdict of a jury, against Francis S. McKnight on account of the death of Doris Johnson who, while riding a bicycle after dark on State Route No. 2, about six or seven miles south of Rockford, was struck by an automobile driven by appellant, and died from her injuries. The suit was against

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NO. 973

IN SENATE
JANUARY 10, 1908

8181A.260

GOVERNMENT PRINTING OFFICE

THE
DISTRICT
COURT

WALTER JOHNSON, Plaintiff,
vs.
The Estate of John Johnson, Defendant.

JAMES J. HENRY, Plaintiff,
vs.
The Estate of John Johnson, Defendant.

JAMES J. HENRY, Plaintiff,
vs.
The Estate of John Johnson, Defendant.

Vol. 4.

This report is made in accordance with the order of the court in the case of *Johnson vs. Johnson*, and is intended to show the results of the investigation made by the committee on the subject of the alleged fraud in the sale of the property of the estate of John Johnson. The committee has found that the sale was made in accordance with the order of the court, and that the proceeds of the sale were distributed to the creditors of the estate in accordance with the order of the court. The committee has also found that the sale was made in accordance with the order of the court, and that the proceeds of the sale were distributed to the creditors of the estate in accordance with the order of the court.

appellant and Morton Salt Company, whose insignia was on the automobile which appellant was driving at the time of the accident, but this defendant was granted a severance.

The points argued for reversal are that appellee failed to prove the decedent's due care; failed to prove any negligence of appellant; that the trial court erred in the admission and rejection of testimony ^{and} in refusing to allow the jury to take with them an exhibit upon their retirement ^{and} in the giving, modification and refusal of instructions.

State Route No. 2 is a winding road paralleling Rock River. The testimony is not clear as to its exact direction at the place of the accident, but most of the testimony indicates that it runs approximately east and west, curving to the south where the accident occurred. A short distance to the east, a road known as the Prairie Road runs north from the pavement, but does not continue south of it. In the northeast corner of the intersection, about eighty feet east of the Prairie Road, is a filling station and store operated by J. H. Frisk. Directly across from the store is the "Hidden Inn Road" running south. The deceased, a girl of sixteen years, lived at home with her parents, and eight brothers and sisters. All of the brothers and sisters, except one sister eighteen years old, were younger than Doris. The family lived on the north side of State Route No. 2 a short distance west of the Prairie Road. The decedent was a strong, healthy girl of excellent habits. She worked on the farm, milking cows, driving the harvester, loading hay and doing other farm work. She attended high school in the City of Rockford, going from her home and returning on a bicycle, through busy streets, and had ridden a bicycle for six

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upon their testimony and in the light of the evidence of the
of testimony, it is not to be taken as a basis for the
apparent; and the fact that the witness is not a
prove the same, and the fact that the witness is not a

The testimony is not clear as to the exact location of the place of the accident, but it is stated that the accident occurred in the vicinity of the intersection of the main highway and the branch road. The witness further stated that the accident occurred in the early morning hours of the day.

or seven years. She was a bright girl, interested in athletic sports and the testimony of disinterested witnesses shows she was a careful person.

About 6:00 P. M. on October 23, 1940, she rode her brother's new bicycle to the Frisk store and purchased matches and crackers. It was quite dark and the lights outside were lighted. The proprietor testified he went out to see the new bicycle and observed, as Doris left, as she rode west, a lighted head light on it; that he last saw her alive as "she was about in the middle of the Prairie Road." This indicates that she was then on the north or right hand side of the road. The point mentioned is about one-third of the way between the store and where she was struck by appellant's car.

Frisk testified that just after he re-entered the store he heard a crash, went to the door and saw appellant's car, stopped at a forty-five degree angle across the road, headed toward the entrance to the Hidden Inn Road, with most of the car on the cement highway; that appellant ran out of the car across the highway to the north, came right back, asked the witness to call an ambulance or a doctor and said he had hit a girl on a bicycle; that appellant was very much excited and said he saw the bicycle, but too late to avoid the accident; and that when appellant came closer after stepping out of the car, the witness saw a red tail light down the hill on the road west, but did not see any car pass him.

The decedent's body and the articles purchased were found in the ditch about fifteen feet north of the pavement and about 180 feet west of the Prairie Road. The bicycle lay about twenty-five feet farther north. The body of the deceased was badly mangled and both bones of the left leg were broken. There was ^adeep laceration of the left

on seven pages. The first page, however, is devoted to a general
and the section of the text is as follows:

About 10:30 A.M. on October 15, 1944, the first two days of
the trip to the first camp and the second camp were made.
It was quite dark and the first camp was reached. The first
camp was reached at 11:00 A.M. and the second camp was reached at 12:00 P.M.
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temple and a deep skull fracture of the left temporal region. She had multiple lacerations and abrasions over the entire body and a deep laceration of the right thigh about ten inches long. She lived about six hours. There was no blood or flesh on the pavement. There was blood over the left side of the car and blood and flesh on the left fender, which was crumpled.

Two deputy sheriffs arrived shortly after the accident. One of them testified appellant told him he did not see the girl and did not know what he had hit; that appellant said he was going home and did not know how fast he was going, but was late, and maybe driving a little faster than usual. The other deputy testified appellant told him he did not see the girl until it was too late to avoid hitting her, and that he did not see any other traffic coming at the time; that the witness heard him say he did not know whether he or the girl was in the right or which side of the road she was on. Both of them testified they used a flash light and saw no skid marks on the pavement; that appellant's car was standing on the pavement, extending out to the middle line, substantially as testified by Frisk; and that about twenty or thirty minutes after they arrived, they moved it off the pavement. A witness for appellant testified the car was in the entrance to the Hidden Inn Road with only a little of it on the highway before the deputies came. Appellant denied making the statements testified to by the deputies, and stated he said he was on the right side of the road near the black line, driving forty-five to fifty miles an hour.

The next morning, between 6:00 and 7:00 o'clock, Frisk and Herbert Warner, a neighbor, examined the pavement. They testified they found black skid marks extending from a point about 170

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to 175 feet west of the Prairie Road in a curve from the north side of the pavement to the place where appellant's car was stopped. Frisk testified the marks came directly to where the car stood. Warner testified the marks went in and made a hole where the front wheels were. The testimony of each of them shows that both skid marks were north of the center line of the pavement for some distance east of the place of the accident.

A statement, written by Albert Krier and signed by Frisk on October 25th was introduced in evidence by appellant to impeach Frisk. The statement recites: "A moment after this crash I saw a tail light on a southbound car going down the hill just south of the intersection just before the northbound car had stopped. There were no skid marks on the pavement. I have read the above and find it to be true." Frisk testified he did not look for skid marks on the night of the accident; that he did not read the statement he signed; that it was read to him and he just signed it, and as far as he could remember he said nothing about skid marks. Krier contradicted a part of the testimony of Frisk, but did not directly testify that Frisk read the statement. It was obvious that if Frisk said anything about skid marks he meant that he saw none that night, and the most charitable view of Krier's testimony is that he misunderstood Frisk. Nobody contradicted the testimony of Frisk and Warner that the marks were there the next morning. It is not shown that the deputies examined the place where the marks appeared, and the fact that they were black may well account for their failure to see them.

Appellant claims the testimony of Frisk and Warner as to seeing the skid marks the next morning was incompetent on the ground that other cars had passed over and stopped on the highway.

to the feet west of the building in a north-south line
side of the building to the right corner of the building
ed. First testified the same thing in the same way
stood. Second testified the same thing in the same way
the front of the building. The testimony of each of these men was
both said words were used in the same line of the building for
some distance west of the corner of the building.

A statement, written by Albert Smith and signed by him
on October 20th was introduced in evidence in evidence in evidence
First, the statement testified: "I cannot recall with I was
a tall light-colored man, wearing a suit and tie, and I was
of the investigation just before the building was destroyed.
There were no other men on the premises. I have read the report
and find it to be true." First testified he did not know the
said man on the night of the building; that he did not know the
statement of Smith; that he was not in the building on the night
of, and he did not recall the man's name or his position in the
works. First corroborated a part of the testimony of Smith, but
did not directly testify that Smith was on the premises. It was
obvious that if First did testify about this man, it was
that he saw him that night. At the same time, Smith testified
First's testimony is that he saw the man on the night of the
dicated the testimony of First and Smith that the man was there
the next morning. It is not known what the witness testified the
place where the man was seen, and the fact that the man was seen
may well account for Smith's testimony on that point.

Additional copies of the statement of First and Smith were
to testify the said man was there on the night of the building
found that other men had been seen near the building on the night.

The contention is untenable. Cars passing in either direction or stopping where appellant's car stood would not make marks of that character. In Kirsch v. Ford, 1 New Series Neg. & Comp. Cases 633, cited by appellant, it was held that testimony was not admissible as to skid marks attributed to a car which did not arrive at the place of the accident until an hour and a half after it occurred, and the car had been removed and other traffic had passed over the highway during the interim. Obviously that case is not persuasive here. Likewise, Cox v. Dreher, 293 Ill. App. 323, holding that skid marks alone were not sufficient to show wilful and wanton conduct, where there was no other evidence to support the charge, is not applicable. Other cases cited by appellant where it is held there can be no recovery where no negligence of the defendant was proven are in the same category. In Pohl v. ~~Frank~~^{Fanni}, 308 Ill. App. 440, where tire marks were not seen until the day after the accident, the court held they were competent evidence. Under the circumstances shown in this case, the testimony as to the tire marks was admissible.

As to the tail light seen by Frisk, as we view the matter, whether he saw it immediately before or after appellant's car stopped, is of no consequence. The claim that a car bearing it might have struck the decedent, throwing her into appellant's path, or that it might have caused her to swerve onto the wrong side of the road is without foundation. The first claim is refuted by the fact that there was no blood on the pavement. The skid marks show appellant's car was on the north side of the center line. If another car was then passing, the result would have been a head on collision between it and appellant's car. If another car had already passed, causing decedent to swerve onto the wrong side of

The contention is untenable. It is plain in plain English that
stopping there would not have been a collision. In fact, it was
contrary. In fact, it was, I now understand, a very
653, cited by the court, in the fact that the collision
attributable to the fact that the collision was not
at the place of the collision with the car, but rather
occurred, and the car had been removed and the collision had
over the highway during the incident. Obviously, that is not
persuasive. In fact, the court, in fact, the collision
that the collision was not attributable to the fact that the
conduct, where there was no other evidence to suggest the
not applicable. Other cases cited by the court were it is not
can be no recovery. There is no negligence of the defendant and
in the same category. In fact, the court, in fact, the collision
marks were not seen until the day after the collision, and the collision
were consistent evidence. The fact that the collision was in fact
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is of no consequence. The fact that the collision was in fact
strike the defendant, showing that the collision was in fact
it might have been the fact that the collision was in fact
is without foundation. The fact that the collision was in fact
that there was no collision with the car. The fact that the
appellant's car was on the north side of the highway. It
another fact that the collision was in fact, and the collision
collision between it and the car. It is not in fact
already present, causing the collision to occur on the north side of

the pavement, appellant's car would have missed her. Moreover, he did not deny telling one of the deputies that he saw no other traffic. The logical inference from all the testimony is that if the light Frisk saw was a tail light on a car, the car had passed after the accident without being noticed by appellant in his excitement or by Frisk while he was still in the store. It is also to be observed that the record does not indicate the light was not on a car that might have come onto the pavement after the accident and beyond where it occurred. The testimony as to the light does not tend to show the decedent was not exercising due care or that appellant was not guilty of negligence.

While the burden of proving that decedent was in the exercise of due care for her own safety was upon appellee, that fact need not be established by direct and positive testimony, but may be inferred from all the facts and circumstances shown to exist prior to and at the time of the injury. (*Schaffner v. Massey Co.*, 270 Ill. 207.) Where there is no eye witness to a fatal accident, except the defendant who caused it, and who is consequently incompetent to testify, evidence that the decedent was a careful person is competent on the question of due care. (*Young v. Patrick*, 323 Ill. 200; *Stollery v. Cicero Street Railway Co.*, 243 id. 290.) By appellant's own admission he was driving at least forty-five to fifty miles per hour on a curve in the dark. There was no blood on the pavement, which strongly indicates that decedent was struck on the north edge of it. Her head light was lighted, and when last seen alive she was on the proper side of the road. She was a careful person. When there is any evidence which, taken with its reasonable inferences in the aspect most favorable to the

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plaintiff, tends to show the exercise of due care on the part of the deceased, the question of due care is one for the jury. Whether there is any such evidence is a question of law. (Dee v. City of Peru, 343 Ill. 36.) Manifestly there was evidence in this case which required the question of due care to be submitted to the jury and when all of the testimony is considered, the conclusion that the verdict is not against the manifest weight of the evidence is inescapable.

Another contention that is without merit is that the court committed reversible error in permitting the witness Smith to testify to an excessive speed of appellant's car five minutes before the accident. At the close of the testimony for appellee, the court informed the jury the testimony was stricken and orally instructed them to disregard it entirely. The same direction to disregard stricken testimony was repeated in the written instructions. The court also refused to permit another occupant of Smith's car to testify to the same fact. Under all these circumstances and the repeated instructions of the court, there was no prejudice to defendant (Chicago & Grand Trunk Railway Co. v. Gasinowski, 156 Ill. 189.)

Appellee's exhibit 7, a photograph of the left side of appellant's car jacked up in a garage with the left front wheel removed, was admitted in evidence over objection that the car was not in the same condition as when the accident happened. It is not claimed the car was not in the same condition except that the wheel had been removed. Removing the wheel would not change the appearance of the fender or the side of the car, the condition of which, showing the blood and flesh, was the only purpose for which the exhibit was introduced. There was no prejudice to appellant in admitting this photograph in evidence.

Refusing to allow the jury to take the written statement of Frisk to the jury room was not error. It contained statements upon

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defendant (through a good friend who is a member of the
repeated insistence of the court, there was no violation of
testify to the fact that all these circumstances and the
The court also refused to grant a continuance of trial on the
disregard of the defendant's testimony and refusal to testify.
instructed him to testify in truth. The court stated in
the court informed him that the defendant was ordered to testify
before the defendant. At the time of the testimony the defendant
to testify to an adverse fact. The defendant's testimony was
court continued testimony after the defendant had testified.
appear continuously after the defendant had testified.

There are no indications of a connection between the two cases of violence.

Explain the difference between the two types of errors. The first type of error is a false positive, which occurs when a model incorrectly predicts a positive outcome. The second type of error is a false negative, which occurs when a model incorrectly predicts a negative outcome.

which it was not sought to impeach him and upon which there was no testimony. It was not read in evidence, and therefore is not within the terms of section 67 of the Civil Practice Act. (People v. Clark, 301 Ill. 428 (432.) The practice of allowing such papers to be taken by the jury was condemned in Whitney v. Whitman, 5 Mass. 404, and Page v. Wheeler, 5 N. H. 91, cited with approval in Rawson v. Curtis, 19 Ill. 456 (482-3).

Appellant called the mother of decedent as an adverse witness under section 60 of the Civil Practice Act. She testified that at the coroner's inquest she stated that soon after decedent left to go to the store, one of the other children said Doris had been hurt; that she did not give it much ~~thought~~^{claim} as she had fallen off the bicycle so many times and hurt her knee, and she thought it was just another one of those bumps. On cross-examination, she testified that Doris had ridden a bicycle six or seven years, and fell off sometimes as every child does; that she rode to the Rockford high school "right through the main street" because there were no hills; and that she was a good bicycle rider. Appellant ~~contends~~^{claims} that this qualified him as an occurrence witness. Section 2 of the Evidence act provides:

~ ~ ~

"No party to any civil action *** shall be allowed to testify of his own motion, or in his own behalf *** when any adverse party sues or defends as the executor, administrator, heir, legatee or devisee *** of any deceased person, unless when called as a witness by such adverse party so suing or defending, and also except in the following cases, namely: ***

Third: when in any such action, suit or proceeding, any such party suing or defending, as aforesaid, or any persons having a direct interest in the event of such action, suit or proceeding, shall testify in behalf of such party so suing or defending, to any conversation or transaction with the opposite party or parties in interest, then such opposite party or parties in interest shall also be permitted to testify as to the same conversation or transaction."

In the first place, decedent's mother did not testify to "any conversation or transaction" with the opposite party. In

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I have been thinking of you very much lately, and wondering how you are getting on. I hope you are well and happy. I have been very busy lately, but I have managed to find some time to write to you. I have been thinking of you very much lately, and wondering how you are getting on. I hope you are well and happy. I have been very busy lately, but I have managed to find some time to write to you.

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In the event of a change of circumstances, the Board of Directors may, in its discretion, amend the plan.

the second place, the witness was never at any time called in her own behalf or in behalf of appellee as to the habits or carefulness of the decedent. It is obvious that the exception in paragraph 2 was not designed to permit one party to call an adverse party for the purpose of opening up a question in order to enable the party calling the witness to testify concerning the question.

Such a practice would in effect nullify the first part of the section. The exception in the third paragraph plainly means only that when an interested party testifies in his own behalf, that is, takes the witness stand of his own motion, as to any conversation or transaction with the opposite party, then the bar is removed from such opposite party as to such conversation or transaction. Express exceptions are not to be construed as embracing anything beyond their terms. Appellant was not a competent occurrence witness. (*Combs v. Young*, 281 Ill. App. 339.)

An instruction is complained of that told the jury:

"The law presumes such kinsmen (father, mother, brothers and sisters) have sustained some substantial damages from the fact of their relationship alone and the death of Doris Johnson." There is such a presumption as to parents or lineal next of kin. (*City of Chicago v. Hesing*, 83 Ill. 204; *Grace & Hyde v. Strong*, 127 Ill. App. 336; *Wilcox v. Bierd*, 330 Ill. 571.) The presumption does not extend to collaterals. (*Frankov. Crosby*, 278 Ill. App. 416.) When all the next of kin are collaterals and they have not received pecuniary aid from the decedent, only nominal damages are recoverable. (*Rhoads v. Chicago and Alton Railroad Co.*, 227 Ill. 328.) In a death case, such as this, there is no separation of damages to be assessed by the jury. The verdict and judgment are for one gross amount, irrespective of the number of the next of kin. (*Garnhart v. Reeves*, 288 Ill. App. 159.) In *Grace & Hyde v. Strong*, *supra*, the decedent left surviving

which is not a part of the contract and which is not within the contemplation of the contract, and therefore is not within the contemplation of the contract. It is not a part of the contract, and therefore is not within the contemplation of the contract. The terms of section 11 of the Civil Service Act (Public Law 401, 1961, 401-1) are not within the contemplation of the contract. To be taken up by the law and considered in relation to the contract, it is not a part of the contract, and therefore is not within the contemplation of the contract. In *Reynolds v. United States*, 98 U.S. 145 (1878).

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in the first place, because it is not possible to have a "pure" or "unadulterated" form of the language. It is always a mixture of different influences, and it is always changing. It is always a living language, and it is always a language of the people.

the second place, the witness was never at any time called in her own behalf or in behalf of appellee as to the habits or carefulness of the decedent. It is obvious that the exception in paragraph 2 was not designed to permit one party to call an adverse party for the purpose of opening up a question in order to enable the party calling the witness to testify concerning the question.

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him, his parents and fourteen brothers and sisters. On appeal to the Supreme Court (224 Ill. 630) it was contended the verdict and judgment for \$2000.00 was unwarranted because the evidence showed the deceased was contributing only to the support of his father and mother. The court said of this contention: "As there ^{was} ~~is~~ evidence tending to show that some, at least, of the next of kin of deceased had sustained a pecuniary loss by his death it cannot be said that no more than nominal damages could be allowed," and the judgment was affirmed. In this case, in addition to the presumption in favor of the parents, the evidence shows that decedent, by her farm labor, was contributing to the support of the family. While the instruction was not technically accurate, appellant suffered no prejudice from it. Other instructions told the jury that pecuniary loss in the measure of damages.

Another instruction was in the language of section 70 of the Injuries Act, which provides that the jury may give such damages as they shall deem a fair and just compensation with reference to the pecuniary injuries resulting from such death, to the next of kin of such deceased persons, not exceeding the sum of \$10,000.00. The claim that it is erroneous for the same reason as an instruction in *Baker & Reddick v. Summers*, 201 Ill. 52, cannot be upheld. In that case the court gave an instruction substantially in the words of the Dram Shop Act, stating the liability to be for all damages sustained, "and in this case not exceeding the sum of \$5000.00." The court held the instruction was erroneous in substantially telling the jury the defendants were liable for the damages ^{sustained} ~~not~~ exceeding the sum of \$5000.00, without proof of the necessary facts, and merely because the statute provided for a liability. The instruction in the case at bar was not of the peremptory character of that instruction. It made no reference to this case, but was

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merely in the language of the Statute. Not being of a peremptory nature it was unnecessary that it include all the elements for a recovery. In Scally v. Flannery, 292 Ill. App. 349, an instruction was condemned which told the jury that certain rates of speed are by statute made prima facie evidence that the driver was travelling at a rate not reasonable and proper, because the matter of speed was one of the prime questions in the case. Neither of those cases is controlling here. An instruction repeating verbatim a section of the statute, even though, in itself, misleading, does not require a reversal of the judgment, where, as here, other instructions specifically stating the law applicable to the facts appear in the record. (People v. ^{Schuman,} ~~Moore~~, 374 Ill. 292; White v. People 179 Id. 356.) Giving an instruction in the language of the statute under circumstances similar to this case, is not error. (Deming v. Chicago, 321 Ill. 341.) Complaint is made as to the modification of other instructions by omitting reference to pecuniary benefits and due care of plaintiff's intestate. The matter omitted is covered by other given instructions.

While it seems inevitable that minor errors will creep into every contested trial, such errors are not sufficient for reversal where there has been a fair trial and substantial justice has been done. We find no reversible error in the record. The judgment of the circuit court is therefore affirmed.

Judgment affirmed.

Mod'd opinion 3-26-42
313 2d App 260
Ala.

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the 3rd day of February, in
the year of our Lord, one thousand nine hundred and forty-two,
within and for the Second District of the State of Illinois:

Present -- the HON. BLAINE HUFFMAN, Presiding Justice

HON. FRANKLIN R. DOVE, Justice

HON. FRED G. WOLFE, Justice

JUSTUS L. JOHNSON, Clerk

E. J. WELTER, Sheriff

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313 I.A. 260³

BE IT REMEMBERED, that afterwards, to-wit: On MAR 2 1942
~~the~~ **modified and amended** Opinion of the Court was filed in the Clerk's Office of
said Court, in the words and figures following, viz:

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

October Term, A. D. 1947

WALTER JOHNSON, Administrator
of the Estate of Doris Johnson,
Deceased,

Appellee

vs

FRANCIS McKNIGHT and MORTON SALT
CO., a corporation,

Appellants

Appeal from
Circuit Court,
Winnebago County.

DOVE, J:

This appeal is from a judgment of the circuit court of Winnebago county for \$4,000.00, rendered on a verdict of a jury, against Francis S. McKnight on account of the death of Doris Johnson, who, while riding a bicycle after dark on State Route No. 2, about six or seven miles south of Rockford, was struck by an automobile driven by appellant, and died from her injuries. The suit was against appellant and Morton Salt Company, whose insignia was on the automobile which appellant was driving at the time of the accident, but this defendant was granted a severance.

The points argued for reversal are that appellee failed to prove the decedent's due care; failed to prove any negligence of appellant; that the trial court erred in the admission and rejection of testimony and in refusing to allow the jury to take with them an exhibit upon their retirement and in the giving, modification and refusal of instructions.

State Route No. 2 is a winding road paralleling Rock River. The testimony is not clear as to its exact direction at the place of the accident, but most of the testimony indicates that it runs approx-

IN THE
COURT OF COMMONS
DISTRICT

October 1, 1911

WALTER JENNISON, Administrator
of the Estate of Boris Johnson,
Deceased,

Appellee

vs

FRANCIS MCKNIGHT and SALT
CO., a corporation,

Appellants

Appeal from
Circuit Court,
Winnebago County.

DOVE, J.:

This appeal is from a judgment of the circuit court of Winnebago county for \$4,000.00, rendered on a verdict of a jury, against Francis M. McKnight on account of the death of Boris Johnson, who, while riding a bicycle after dark on State Route No. 2, about six or seven miles south of Rockford, was struck by an automobile driven by appellant, and died from her injuries. The suit was against appellant and certain Salt Company, whose machine was on the automobile when appellant was driving at the time of the accident, but this defendant was granted a severance.

The points argued for reversal are that appellant failed to prove the deceased's fault; failed to prove any negligence of appellant; that the trial court erred in the admission and rejection of certain evidence and in refusing to allow the jury to take into consideration upon their retirement and in the giving, modification and refusal of instructions.

State Route No. 2 is a winding road parallel to the river. The testimony is not clear as to the exact direction of the place of the accident, but most of the testimony indicates that it was upon

imately east and west, curving to the south where the accident occurred. A short distance to the east, a road known as the Prairie Road runs north from the pavement, but does not continue south of it. In the northeast corner of the intersection, about eighty feet ~~xx~~ east of the Prairie Road, is a filling station and store operated by J. H. Frisk. Directly across from the store is the "Hidden Inn Road" running south. The deceased, a girl of sixteen years, lived at home with her parents, and eight brothers and sisters. All of the brothers and sisters, except one sister eighteen years old, were younger than Doris. The family lived on the north side of State Route No. 2 a short distance west of the Prairie Road. The decedent was a strong, healthy girl of excellent habits. She worked on the farm, mil^king cows, driving the harvester, loading hay and doing other farm work. She attended high school in the City of Rockford, going from her home and returning on a bicycle, through busy streets, and had ridden a bicycle for six or seven years. She was a bright girl, interested in athletic sports and the testimony of disinterested witnesses shows she was a careful person.

About 6:00 P.M. on October 23, 1940, she rode her brother's new bicycle to the Frisk store and purchased matches and crackers. It was quite dark and the lights outside were lighted. The proprietor testified he went out to see the new bicycle and observed, as Doris left, as she rode west, a lighted headlight on it; that he last saw her alive as "she was about/ⁱⁿthe middle of the Prairie Road." This indicates that she was then on the north or right hand side of the road. The point mentioned is about one-third of the way between the store and where she was struck by appellant's car.

Frisk testified that just after he re-entered the store he heard a crash, went to the door and saw appellant's car, stopped at a forty-five degree angle across the road, headed toward the entrance to the Hidden Inn Road, with most of the car on the cement highway; that appellant ran out of the car across the highway to the north, came right back, asked the witness to call an ambulance or a doctor and said he had hit a girl on a bicycle; that appellant was very much excited and said he saw the bicycle, but too late to avoid the accident; and

immediately east and west, curving to the south where the accident occurred. A short distance to the east, a road known as the Prairie Road runs north from the highway, but does not continue south of it. In the northeast corner of the intersection, about thirty feet east of the Prairie Road, is a filling station and store operated by J. B. Frisk. Directly across from the store is the "Hidden Inn Road" running south. The deceased, a girl of sixteen years, lived at home with her parents, and eight brothers and sisters. All of the brothers and sisters, except one sister eighteen years old, were younger than Chris. The family lived on the north side of State Road No. 2 a short distance west of the Prairie Road. The deceased was a strong, healthy girl of excellent habits. She worked on the farm, milking cows, driving the harvester, loading hay and doing other farm work. She attended high school in the City of Lockford, going from her home and returning on a bicycle, through busy streets, and had ridden a bicycle for six or seven years. She was a bright girl, interested in athletic sports and the testimony of disinterested witnesses shows she was a careful person.

About 6:00 P.M. on October 23, 1940, she rode her brother's new bicycle to the risk store and purchased apples and oranges. It was quite dark and the lights outside were lighted. The proprietor testified he went out to see the new bicycle and observed, as he left, as she rode west, a lighted headlight on it; that he last saw her alive as "she was about the middle of the Prairie Road." This indicates that she was then on the north or right hand side of the road. The point mentioned is about one-third of the way between the store and where she was struck by defendant's car.

Frisk testified that just after he re-entered the store he heard a crash, went to the door and saw defendant's car, stopped at a forty-five degree angle across the road, headed toward the entrance to the Hidden Inn Road, with most of the car in the nearest highway; that appellant ran out of the car across the highway to the north, came right back, asked the witness to call for assistance of a doctor and said he had hit a girl on a bicycle; that appellant was very much excited and said he saw the bicycle, but too late to avoid the accident; and

that when appellant came closer after stepping out of the car, the witness saw a red tail light down the hill on the road west, but did not see any car pass him.

The decedent's body and the articles purchased were found in the ditch about fifteen feet north of the pavement and about 180 feet west of the Prairie Road. The bicycle lay about twenty-five feet farther north. The body of the deceased was badly mangled and both bones of the left leg were broken. There was a deep laceration of the left temple and a deep skull fracture of the left temporal region. She had multiple lacerations and abrasions over the entire body and a deep laceration of the right thigh about ten inches long. She lived about six hours. There was no blood or flesh on the pavement. There was blood over the left side of the car and blood and flesh on the left fender, which was crumpled.

Two deputy sheriffs arrived shortly after the accident. One of them testified appellant told him he did not see the girl and did not know what he had hit; that appellant said he was going home and did not know how fast he was going, but was late, and maybe driving a little faster than usual. The other deputy testified appellant told him he did not see the girl until it was too late to avoid hitting her, and that he did not see any other traffic coming at the time; that the witness heard him say he did not know whether he or the girl was in the right or which side of the road she was on. Both of them testified they used a flash light and saw no skid marks on the pavement; that appellant's car was standing on the pavement, extending out to the middle line, substantially as testified by Frisk; and that about twenty or thirty minutes after they arrived, they moved it off the pavement. A witness for appellant testified the car was in the entrance to the Hidden Inn Road with only a little of it on the highway before the deputies came. Appellant denied making the statements testified to by the deputies, and stated he said he was on the right side of the road near the black line, driving forty-five to fifty miles an hour.

The next morning, between 6:00 and 7:00 o'clock, Frisk and Herbert Warner, a neighbor, examined the pavement. They testified they found

that when appellant came closer after stepping out of the car, the witness saw a red tail stick down the hill on the road west, but did not see any car pass him.

The deceased's body and the clothing he was wearing were found in the ditch about fifteen feet north of the pavement and about ten feet west of the bridge road. The body of the deceased was badly mangled and bent backward. The left leg were broken. There was a deep laceration of the left temple and a deep skull fracture of the left temple region. The head had multiple lacerations and abrasions over the entire top and a deep laceration of the right thigh about ten inches long. The liver about six hours. There was no blood or flesh on the pavement. There was blood over the left side of the car and blood and flesh on the left fender, which was crumpled.

Two deputy sheriffs arrived shortly after the accident. One of them testified appellant told him he did not see the girl and did not know what he had hit; that appellant said he saw some bones and did not know how fast he was going, but was sure, and was driving a little faster than usual. The other deputy testified appellant told him he did not see the girl until it was too late to avoid hitting her, and that he did not see any other traffic coming at the time; that the witness heard him say he did not know whether he hit the girl was in the right or which side of the road he was on. Both of them testified they used a flash light and saw no other marks on the pavement; that appellant's car was standing on the pavement, straddling one to the middle line, substantially as testified by him; and that about twenty or thirty minutes after they arrived, they went to hit the pavement. A witness for appellant testified the car was in the position on the Hidden Inn Road with only a little of it on the highway between the deputies came. Appellant denied making the statements testified to by the deputies, and stated he said he was on the right side of the road near the black line, driving forty-five to fifty miles an hour.

The next morning, between 8:00 and 9:00 o'clock, John A. Warner, a neighbor, examined the pavement. They testified that

black skid marks extending from a point about 170 to 175 feet west of the Prairie Road in a curve from the north side of the pavement to the place where appellant's car was stopped. Frisk testified the marks came directly to where the car stood. Warner testified the marks went in and made a hole where the front wheels were. The testimony of each of them shows that both skid marks were north of the center line of the pavement for some distance east of the place of the accident.

A statement, written by Albert Krier and signed by Frisk on October 25th was introduced in evidence by appellant to impeach Frisk. The statement recites: "A moment after this crash I saw a tail light on a southbound car going down the hill just south of the intersection just before the northbound car had stopped. There were no skid marks on the pavement. I have read the above and find it to be true." Frisk testified he did not look for skid marks on the night of the accident; that he did not read the statement he signed; that it was read to him and he just signed it, and as far as he could remember he said nothing about skid marks. Krier contradicted a part of the testimony of Frisk, but the abstract does not show he testified that Frisk read the statement. It was obvious that if Frisk said anything about the skid marks he meant that he saw none that night, and the most charitable view of Krier's testimony is that he misunderstood Frisk. Nobody contradicted the testimony of Frisk and Warner that the marks were there the next morning. It is not shown that the deputies examined the place where the marks appeared, and the fact that they were black may well account for their failure to see them.

Appellant claims the testimony of Frisk and Warner as to seeing the skid marks the next morning was incompetent on the ground that other cars had passed over and stopped on the highway. The contention is untenable. Cars passing in either direction or stopping where appellant's car stood would not make marks of that character.

In *Kirsch v. Ford*, 1 New Series Negligence and Compensation Cases, 633, and *Marine v. Stewart*, 165 Md. 698, 168 At. 891, relied upon by appellant, where the witness in each case was interrogated as to skid marks observed some time after the accident, and traffic had passed

over the spot meanwhile, the offer of the testimony was excluded as improper, and we think properly so, because the skid marks were in line with the line of the traffic, and not, as here, curving across it from the left side of the pavement. Neither of those cases is in point. Likewise, *Cox v. Dreher*, 293 Ill. App. 323, holding that skid marks alone were not sufficient to show wilful and wanton conduct, where there was no other evidence to support the charge, is not applicable. Other cases cited by appellant where it is held there can be no recovery where no negligence of the defendant was shown are in the same category.

The weight of authority is that evidence of skid marks seen by witnesses some time after the accident is not incompetent, but the weight of such testimony is for the jury. In the following cases, the testimony was held admissible: *Stutzman v. Younkerman*, 204 Iowa, 1162, 216 N.W. 627 (Five hours by one witness, twelve hours by another); *Flach v. Fikes*, 204 Cal. 329, 267 Pac. 1079 (four or five hours with no great amount of travel, but on a business street); *Tomasko v. Raucci*, 113 Conn. 274, 156 At. 64 (One hour by one witness, and the next morning by another); *Still v. Swanson* (Wash.) 27 Pac. (2d) 704 (One witness the next morning and one witness the second morning); In three cases, *Bowker v. Illinois Electric Co.*, 112 Cal. App. 740, 297 Pac. 615; *Meier v. Wagner*, 27 Cal. App. 579, 150 Pac. 797; and *Carson v. Turrish*, 140 Minn. 445, 168 N.W. 349, the skid marks were seen by the witnesses the next morning. In *Wallace v. Kramer* (Mich.) 296 N.W. 838, photographs of skid marks twelve days after the accident were held admissible. The *Stutzman* case, the *Flach* case and the *Still* case each holds that the weight of the testimony is for the jury. Under the circumstances shown in this case, the testimony as to the tire marks was admissible.

As to the tail light seen by Frisk, as we view the matter, whether he saw it immediately before or after appellant's car stopped, is of no consequence. The claim that a car bearing it might have struck the decedent, throwing her into appellant's path, or that it might have caused her to swerve onto the wrong side of the road is without foundation. The first claim is refuted by the fact that there was no blood on the pavement. The skid marks show appellant's car was on the north side of

over the spot meanwhile, the rest of the testimony was explained as improper, and we think properly, because the said marks were in line with the line of the traffic, and not, as some, having come it from the left side of the pavement. Neither of these cases is a point. Likewise, Cox v. Weber, 293 Ill. App. 323, holding that said marks alone were not sufficient to show willful and wanton conduct, where there was no other evidence to support the charge, is not applicable. Other cases cited by appellant where it is held that there can be no recovery where no negligence of the defendant was shown are in the same category. The weight of authority in that evidence of said marks seen by witnesses some time after the accident is not inconsistent, but the weight of such testimony is far the less. In the following cases, the testimony was held inadmissible: Stutzman v. Townshend, 304 Iowa, 1162, 216 N.W. 627 (five hours by one witness, twelve hours by another); Frisch v. Hiken, 201 Cal. 329, 267 Pac. 1079 (four or five hours after no great amount of time, but on a business street); Nichols v. Hancock, 113 Conn. 274, 156 A. 61 (one hour by one witness, and the next morning by another); Still v. Swanson (Iowa), 27 Iowa, 201 (one witness, the next morning and one witness the second morning). In three cases, Bowker v. Illinois Electric Co., 112 Cal. App. 745, 237 Pac. 612; Meier v. Weber, 27 Cal. App. 179, 180 Pac. 707; and Gerson v. Parrish, 140 Minn. 445, 166 N.W. 365, the said marks were seen by the witnesses the next morning. In Helgeson v. Hicken (Iowa), 295 A. 639, photographs of said marks were taken after the accident and were admitted. The Stutzman case, the Frisch case and the Still case each holds that the weight of the testimony in favor of the jury. Hence the circumstances shown in this case, the testimony as to the said marks was inadmissible. As to the toll light seen by Hiken, as we view the matter, whether he saw it immediately before or after appellant's car stopped, is of no consequence. The claim that appellant's car might have struck the deceased, turning her into appellant's car, or that it might have crossed her to strike onto the road, is a mere speculation. The first claim is refuted by the fact that Hiken was on the road at the pavement. The said marks show appellant's car was on the road side of

the center line. If another car was then passing, the result would have been a head on collision between it and appellant's car. If another car had already passed, causing decedent to swerve onto the wrong side of the pavement, appellant's car would have missed her. Moreover, he did not deny telling one of the deputies that he saw no other traffic. The logical inference from all the testimony is that if the light Frisk saw was a tail light on a car, the car had passed after the accident without being noticed by appellant in his excitement or by Frisk while he was still in the store. It is also to be observed that the record does not indicate the light was not on a car that might have come onto the pavement after the accident and beyond where it occurred. The testimony as to the light does not tend to show the decedent was not exercising due care or that appellant was not guilty of negligence.

While the burden of proving that decedent was in the exercise of due care for her own safety was upon appellee, that fact need not be established by direct and positive testimony, but may be ~~if~~ inferred from all the facts and circumstances shown to exist prior to and at the time of the injury. (*Schaffner v. Massey Co.*, 270 Ill. 207). Where there is no eye witness to a fatal accident, except the defendant who caused it, and who is consequently incompetent to testify, evidence that the decedent was a careful person is competent on the question of due care. (*Young v. Patrick*, 323 Ill. 200; *Stollery v. Cicero Street Railway Co.*, 243 id. 290). By appellant's own admission he was driving at least forty-five to fifty miles per hour on a curve in the dark. There was no blood on the pavement, which strongly indicates that decedent was struck on the north edge of it. Her head light was lighted, and when last seen alive she was on the proper side of the road. She was a careful person. When there is any evidence which, taken with its reasonable inferences in the aspect most favorable to the plaintiff, tends to show the exercise of due care on the part of the deceased, the question of due care is one for the jury. Whether there is any such evidence is a question of law. (*Dee v. City of Peru*, 343 Ill. 36.) Manifestly there was evidence in this case which required the question of due care to be submitted to the jury and when all of the testimony is considered, the conclusion that the verdict is not against the manifest weight of the

the center line. If another car was over passing, the witness would have been a head on collision between it and appellant's car. If another car had already passed, having passed to arrive with the witness side of the pavement, appellant's car would have passed him. However, as his not deny taking one of the positions that he was on either side. The logical inference from all the testimony is that if the witness was a tail light on a car, the car had passed after the accident without being noticed by appellant in his movement or by which while he was still in the store. It is also to be observed that the witness does not indicate the light was not on a car that might have come from the rear-ment after the accident and before where it occurred. The testimony as to the light does not tend to show the defendant was not exercising due care on that appellant was not guilty of negligence.

While the burden of proving that defendant was in the exercise of due care for her own safety was upon appellant, that fact need not be established by direct and positive testimony, but may be inferred from all the facts and circumstances known to exist prior to and at the time of the injury. (See *Wheeler v. West*, 275 Ill. 207.) This there is no eye witness to a fatal accident, where the defendant was charged it, and who is consequently incompetent to testify, without that the decedent was a careful person in respect to the condition of the car. (Young v. Patrick, 263 Ill. 400; *Wheeler v. West*, 275 Ill. 207.)

It is appellant's own admission he was looking at foot forty-five to fifty miles per hour on a curve in the road. There was no blood on the pavement, which strongly indicates that defendant was struck on the north side of it. The fact that the witness was last seen alive the west of the proper side of the road. The fact that the person, when asked in the witness stand, could not give any reliable information in the report made favorable to the defendant, tends to show the exercise of due care on the part of the defendant, the position of the car is one for the jury. (See *Wheeler v. West*, 275 Ill. 207.)

Question of law. (See *Wheeler v. West*, 275 Ill. 207.) The fact that there was evidence in this case which required the question of due care to be submitted to the jury and that all of the testimony is in conflict, the conclusion that the verdict is not against the conflict against the

evidence is inescapable.

Another contention that is without merit is that the court committed reversible error in permitting the witness Smith to testify to an excessive speed of appellant's car five minutes before the accident. At the close of the testimony for appellee, the court informed the jury the testimony was stricken and orally instructed them to disregard it entirely. The same direction to disregard stricken testimony was repeated in the written instructions. The court also refused to permit another occupant of Smith's car to testify to the same fact. Under all these circumstances and the repeated instructions of the court, there was no prejudice to defendant. (*Chicago & Grand Trunk Railway Co. v. Gacinoski*, 155 Ill.189; *People v. Hansen*, 378 Ill. 491, (499-500)).

Appellee's exhibit 7, a photograph of the left side of appellant's car jacked up in a garage with the left front wheel removed, was admitted in evidence over objection that the car was not in the same condition as when the accident happened. It is not claimed the car was not in the same condition except that the wheel had been removed. Removing the wheel would not change the appearance of the fender or the side of the car, the condition of which, showing the blood and flesh, was the only purpose for which the exhibit was introduced. There was no prejudice to appellant in admitting this photograph in evidence.

Refusing to allow the jury to take the written statement of Frisk to the jury room was not error. It contained statements upon which it was not sought to impeach him and upon which there was no testimony. It was not read in evidence, and therefore is not within the terms of section 67 of the Civil Practice Act. (*People v. Clark*, 301 Ill. 428 (432)). The practice of allowing such papers to be taken by the jury was condemned in *Whitney v. Whitman*, 5 Mass. 404, and *Page v. Wheeler*, 5 N.R. 91, cited with approval in *Rawson v. Curtis*, 19 Ill. 456 (482-3).

Appellant called the mother of decedent as an adverse witness under section 60 of the Civil Practice Act. She was asked whether the bicycle Doris was riding at the time of the accident was brand new, purchased that day for her brother, whether it was the first time she had ridden it; and whether she often fell off this bicycle. Upon her negative reply to

evidence is inescapable.

Another contention that is without merit is that the court committed reversible error in permitting the witness Smith to testify to an excessive speed of appellant's car five minutes before the accident. At the close of the testimony for appellee, the court instructed the jury the testimony was stricken and orally instructed them to disregard it entirely. The same direction to disregard stricken testimony was repeated in the written instructions. The court also refused to admit another account of Smith's car to testify to the same fact. Under all these circumstances and the repeated instructions of the court, there was no prejudice to defendant. (Chicago & Grand Trunk Railway Co. v. Gasnowski, 155 Ill. 189; People v. Hansen, 308 Ill. 491, (47-500). Appellee's exhibit 7, a photograph of the left side of appellant's car, jacked up in a garage with the left front wheel removed, was admitted in evidence over objection that the car was not in the same condition as when the accident happened. It is not claimed the car was not in the same condition except that the wheel had been removed. Removing the wheel would not change the appearance of the fender or the side of the car, the condition of which, showing the blood and flesh, was the only purpose for which the exhibit was introduced. There was no prejudice to appellant in admitting this photograph in evidence. Refusing to allow the jury to take the written statement of Smith to the jury room was not error. It contained statements upon which it was not sought to impeach him and upon which there was no testimony. It was not read in evidence, and therefore is not within the terms of section 67 of the Civil Practice Act. (People v. Clark, 301 Ill. 427 (43). The practice of allowing such papers to be taken by the jury was condemned in Whitney v. Galtman, 5 Ill. 401, and Page v. Wheeler, 5 Ill. 91, cited with approval in Lewis v. Turner, 19 Ill. 435 (44-5). Appellant called the mother of defendant as an adverse witness under section 66 of the Civil Practice Act. She was asked whether the bicycle Doria was riding at the time of the accident was brand new, purchased that day for her brother, whether it was the first time she had ridden it, and whether she often fell off this bicycle. Upon her negative reply to

the last question she was asked if she did not testify at the coroner's inquest that soon after the decedent left to go to the store, one of the other children said Doris had been hurt; that she did not give it much thought as she had fallen off the bicycle so many times and hurt her knee, and she thought it was just another one of those bumps. She replied that she supposed she said it if it was written down. On cross-examination, she testified that Doris had ridden a bicycle six or seven years, and fell off sometimes as every child does; that she rode to the Rockford high school "right through the main street" because there were no hills; and that she was a good bicycle rider. Appellant claims the cross-examination was improper, and that this qualified him as an occurrence witness. The manifest purpose of the direct examination was an attempt to show the decedent was not a careful person and not a good bicycle rider. The cross-examination was directly in line with the examination in chief and was not improper. Section 2 of the Evidence act provides:

"No party to any civil action * * * shall be allowed to testify of his own motion, or in his own behalf * * * when any adverse party sues or defends as the executor, administrator, heir, legatee or devisee * * * of any deceased person, unless when called as a witness by such adverse party so suing or defending, and also except in the following cases, namely:

THIRD: When in any such action, suit or proceeding, any such party suing or defending, as aforesaid, or any persons having a direct interest in the event of such action, suit or proceeding, shall testify in behalf of such party so suing or defending, to any conversation or transaction with the opposite party or parties in interest, then such opposite party or parties in interest shall also be permitted to testify as to the same conversation or transaction."

In the first place, decedent's mother did not testify to "any conversation or transaction" with the opposite party. In the second place, the witness was never at any time called in her own behalf or in behalf of appellee as to the habits or carefulness of the decedent. It is obvious that the exception in paragraph 2 was not designed to permit one party to call an adverse party for the purpose of opening up a question in order to enable the party calling the witness to testify concerning the question or to qualify him as an occurrence witness.

The last question she was asked if she did not testify at the coroner's inquest that soon after the deceased left to go to the store, one of the other children said "Dad had been hurt; that she did not give it much thought as she had filled off the bicycle so many times and hurt her knee, and she thought it was just another one of those things. She wanted then she supposed she said it it was written down. On cross-examination she testified that "Dad had ridden a bicycle six or seven years, and fell off sometimes as every child does; that he was not a fool; and that school "right through the main street" because there were no hills; and that she was a good bicycle rider. Apparently during the cross-examination was improper, and that this qualified him as an assistance witness. The manifest purpose of the direct examination was an attempt to show the deceased was not a careful person and not a good bicycle rider. The cross-examination was directly in line with the examination in chief and was not improper. Section 2 of the Evidence Act provides:

"No party to any civil action shall be allowed to testify of his own motion, or in his own behalf, as to any adverse facts, or as to the execution, administration, sale, legacies or bequests of any deceased person, unless when called as a witness by some adverse party so as to impeach, and also except in the following cases, namely:

THIRD: "Then in any such action, suit or proceeding, any such party shall be permitted to testify, or any person having a direct interest in the event of such action, suit or proceeding, shall testify in behalf of such party so as to impeach, to any conversation between him with the opposite party or parties in interest, then such opposite party or parties in interest shall also be permitted to testify as to the same conversation or transaction."

In the first place, deceased's mother did not testify to any conversation or transaction with the opposite party. In the second place, the witness was never at any time called as her own witness or in behalf of appellee as to the habits or characteristics of the deceased. It is obvious that the exception in paragraph 3 was not intended to permit one party to call an adverse party for the purpose of opening to a question in order to enable the party calling the witness to testify concerning the question or to qualify him as an assistance witness.

Such a practice would in effect nullify the first part of the section. The exception in the third paragraph plainly means only that when an interested party testifies in his own behalf, that is, takes the witness stand of his own motion, as to any conversation or transaction with the opposite party, then the bar is removed from such opposite party as to such conversation or transaction. Express exceptions are not to be construed as embracing anything beyond their terms. Appellant was not a competent occurrence witness. (Combs v. Younge, 281 Ill. App. 339) Rouse v. Tomaseck, 279 Ill. App. 557, relied upon by appellant, is not in point. In that case the plaintiff took the stand of his own motion and testified to the careful habits of the decedent.

An instruction is complained of that told the jury: "The law presumes such kinsman (father, mother, brothers and sisters) have sustained some substantial damages from the fact of their relationship alone and the death of Doris Johnson." There is such a presumption as to parents or lineal next of kin. (City of Chicago v. Hesing, 83 Ill. 204; Grace & Hyde v. Strong, 127 Ill. App. 336; Wilcox v. Bied, 330 Ill. 571.) The presumption does not extend to collaterals. (Franko v. Crosby, 278 Ill. App. 416) When all the next of kin are collaterals and they have not received pecuniary aid from the decedent, only nominal damages are recoverable. (Rhoads v. Chicago and Alton Railroad Co., 227 Ill. 328). In a death case, such as this, there is no separation of damages to be assessed by the jury. The verdict and judgment are for one gross amount, irrespective of the number of the next of kin. (Garnhart v. Reeves, 288 Ill. App. 159). In Grace & Hyde v. Strong, supra, the decedent left surviving him, his parents and fourteen brothers and sisters. On appeal to the Supreme Court (224 Ill. 630) it was contended the verdict and judgment of \$2,000.00 was unwarranted because the evidence showed the deceased was contributing only to the support of his father and mother. The court said of this contention: "As there was evidence tending to show that some, at least, of the next of kin of deceased had sustained a pecuniary loss by his death it cannot be said that no more than nominal damages could be allowed," and the judgment was affirmed. In this case, in addition to the presumption in favor of the parents, the evidence shows that

Such a practice would be in effect to allow the jury to determine the question of the defendant's guilt. The exception in the above language is only a narrow one, and when an interested party testifies in his own behalf, it is, of course, the witness stand of his own volition, and he is not to be considered as acting with the opposite party, and the law is removed from such action with the opposite party as to such statements or admissions. Statements made by a party are not to be considered as admissions of guilt, except their terms. Plaintiff was not a competent competent witness. (Carr v. Jones, 181 Ill. App. 339) Jones v. Jones, 273 Ill. App. 557, 1937, 1938, 1939, 1940, 1941, 1942, 1943, 1944, 1945, 1946, 1947, 1948, 1949, 1950, 1951, 1952, 1953, 1954, 1955, 1956, 1957, 1958, 1959, 1960, 1961, 1962, 1963, 1964, 1965, 1966, 1967, 1968, 1969, 1970, 1971, 1972, 1973, 1974, 1975, 1976, 1977, 1978, 1979, 1980, 1981, 1982, 1983, 1984, 1985, 1986, 1987, 1988, 1989, 1990, 1991, 1992, 1993, 1994, 1995, 1996, 1997, 1998, 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2037, 2038, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2046, 2047, 2048, 2049, 2050, 2051, 2052, 2053, 2054, 2055, 2056, 2057, 2058, 2059, 2060, 2061, 2062, 2063, 2064, 2065, 2066, 2067, 2068, 2069, 2070, 2071, 2072, 2073, 2074, 2075, 2076, 2077, 2078, 2079, 2080, 2081, 2082, 2083, 2084, 2085, 2086, 2087, 2088, 2089, 2090, 2091, 2092, 2093, 2094, 2095, 2096, 2097, 2098, 2099, 2100, 2101, 2102, 2103, 2104, 2105, 2106, 2107, 2108, 2109, 2110, 2111, 2112, 2113, 2114, 2115, 2116, 2117, 2118, 2119, 2120, 2121, 2122, 2123, 2124, 2125, 2126, 2127, 2128, 2129, 2130, 2131, 2132, 2133, 2134, 2135, 2136, 2137, 2138, 2139, 2140, 2141, 2142, 2143, 2144, 2145, 2146, 2147, 2148, 2149, 2150, 2151, 2152, 2153, 2154, 2155, 2156, 2157, 2158, 2159, 2160, 2161, 2162, 2163, 2164, 2165, 2166, 2167, 2168, 2169, 2170, 2171, 2172, 2173, 2174, 2175, 2176, 2177, 2178, 2179, 2180, 2181, 2182, 2183, 2184, 2185, 2186, 2187, 2188, 2189, 2190, 2191, 2192, 2193, 2194, 2195, 2196, 2197, 2198, 2199, 2200, 2201, 2202, 2203, 2204, 2205, 2206, 2207, 2208, 2209, 2210, 2211, 2212, 2213, 2214, 2215, 2216, 2217, 2218, 2219, 2220, 2221, 2222, 2223, 2224, 2225, 2226, 2227, 2228, 2229, 2230, 2231, 2232, 2233, 2234, 2235, 2236, 2237, 2238, 2239, 2240, 2241, 2242, 2243, 2244, 2245, 2246, 2247, 2248, 2249, 2250, 2251, 2252, 2253, 2254, 2255, 2256, 2257, 2258, 2259, 2260, 2261, 2262, 2263, 2264, 2265, 2266, 2267, 2268, 2269, 2270, 2271, 2272, 2273, 2274, 2275, 2276, 2277, 2278, 2279, 2280, 2281, 2282, 2283, 2284, 2285, 2286, 2287, 2288, 2289, 2290, 2291, 2292, 2293, 2294, 2295, 2296, 2297, 2298, 2299, 2300, 2301, 2302, 2303, 2304, 2305, 2306, 2307, 2308, 2309, 2310, 2311, 2312, 2313, 2314, 2315, 2316, 2317, 2318, 2319, 2320, 2321, 2322, 2323, 2324, 2325, 2326, 2327, 2328, 2329, 2330, 2331, 2332, 2333, 2334, 2335, 2336, 2337, 2338, 2339, 2340, 2341, 2342, 2343, 2344, 2345, 2346, 2347, 2348, 2349, 2350, 2351, 2352, 2353, 2354, 2355, 2356, 2357, 2358, 2359, 2360, 2361, 2362, 2363, 2364, 2365, 2366, 2367, 2368, 2369, 2370, 2371, 2372, 2373, 2374, 2375, 2376, 2377, 2378, 2379, 2380, 2381, 2382, 2383, 2384, 2385, 2386, 2387, 2388, 2389, 2390, 2391, 2392, 2393, 2394, 2395, 2396, 2397, 2398, 2399, 2400, 2401, 2402, 2403, 2404, 2405, 2406, 2407, 2408, 2409, 2410, 2411, 2412, 2413, 2414, 2415, 2416, 2417, 2418, 2419, 2420, 2421, 2422, 2423, 2424, 2425, 2426, 2427, 2428, 2429, 2430, 2431, 2432, 2433, 2434, 2435, 2436, 2437, 2438, 2439, 2440, 2441, 2442, 2443, 2444, 2445, 2446, 2447, 2448, 2449, 2450, 2451, 2452, 2453, 2454, 2455, 2456, 2457, 2458, 2459, 2460, 2461, 2462, 2463, 2464, 2465, 2466, 2467, 2468, 2469, 2470, 2471, 2472, 2473, 2474, 2475, 2476, 2477, 2478, 2479, 2480, 2481, 2482, 2483, 2484, 2485, 2486, 2487, 2488, 2489, 2490, 2491, 2492, 2493, 2494, 2495, 2496, 2497, 2498, 2499, 2500, 2501, 2502, 2503, 2504, 2505, 2506, 2507, 2508, 2509, 2510, 2511, 2512, 2513, 2514, 2515, 2516, 2517, 2518, 2519, 2520, 2521, 2522, 2523, 2524, 2525, 2526, 2527, 2528, 2529, 2530, 2531, 2532, 2533, 2534, 2535, 2536, 2537, 2538, 2539, 2540, 2541, 2542, 2543, 2544, 2545, 2546, 2547, 2548, 2549, 2550, 2551, 2552, 2553, 2554, 2555, 2556, 2557, 2558, 2559, 2560, 2561, 2562, 2563, 2564, 2565, 2566, 2567, 2568, 2569, 2570, 2571, 2572, 2573, 2574, 2575, 2576, 2577, 2578, 2579, 2580, 2581, 2582, 2583, 2584, 2585, 2586, 2587, 2588, 2589, 2590, 2591, 2592,

decedent, by her farm labor, was contributing to the support of the family. While the instruction was not technically accurate, appellant suffered no prejudice from it. Other instructions told the jury that pecuniary loss in the measure of damages.

Another instruction was in the language of section 70 of the Injuries Act, which provides that the jury may give such damages as they shall deem a fair and just compensation with reference to the pecuniary injuries resulting from such death, to the next of kin of such deceased persons, not exceeding the sum of \$10,000.00. The claim that it is erroneous for the same reason as an instruction in *Baker & Reddick v. Summers*, 201 Ill. 52, cannot be upheld. In that case the court gave an instruction substantially in the words of the Dram Shop Act, stating the liability to be for all damages sustained, "and in this case not exceeding the sum of \$5,000.00." The court held the instruction was erroneous in substantially telling the jury the defendants were liable for the damages sustained not exceeding the sum of \$5,000.00, without proof of the necessary facts, and merely because the statute provided for a liability. The instruction in the case at bar was not of the peremptory character of that instruction. It made no reference to this case, but was merely in the language of the Statute. Not being of a peremptory nature it was unnecessary that it include all the elements for a recovery. In *Scally v. Flannery*, 292 Ill. App. 349, an instruction was condemned which told the jury that certain rates of speed are by statute made prima facie evidence that the driver was travelling at a rate not reasonable and proper because the matter of speed was one of the prime questions in the case. Neither of those cases is controlling here. An instruction repeating verbatim a section of the statute, even though, in itself, misleading, does not require a reversal of the judgment, where, as here, other instructions specifically stating the law applicable to the facts appear in the record. (*People v. Schymen*, 374 Ill. 292; *White v. People*, 179 id. 356). Giving an instruction in the language of the statute under circumstances similar to this case, is not error. (*Reming v. Chicago*, 321 Ill. 341.) Complaint is made as to the modification of other instructions by omitting reference to pecuniary

decendent, by her own fault, was contributed to the support of the family. While the instruction was not technically accurate, appellant suffered no prejudice from it. Other instructions told the jury that pecuniary loss in the measure of damages.

Another instruction was in the language of section 70 of the Illinois Act, which provides that the jury may give such damages as they shall deem a fair and just compensation with reference to the pecuniary injuries resulting from such death, to the next of kin of such deceased persons, not exceeding the sum of \$10,000.00. The claim that it is erroneous for the same reason as an instruction in *Dart v. Hedden v. Summers*, 201 Ill. 52, cannot be upheld. In that case the court gave an instruction substantially in the words of the *Dart* and *Hedden* Act, stating the liability to be for all damages sustained, and in this case not exceeding the sum of \$5,000.00. The court held the instruction was erroneous in substantially telling the jury the defendants were liable for the damages sustained not exceeding the sum of \$5,000.00, without proof of the necessary facts, and merely because the statute provided for a liability. The instruction in the case at bar was not of the peremptory character of that instruction. It made no reference to this case, but was merely in the language of the statute. Not being of a peremptory nature it was unnecessary that it include all the elements for a recovery. In *Gentry v. Gentry*, 202 Ill. 444, an instruction was contained which told the jury that certain facts of speed and by statute made prima facie evidence that the driver was traveling at a rate not reasonable and proper because the motorist of speed was one of the prime questions in the case. Failure of the jury to find in favor of here. An instruction regarding recovery a section of the statute, even though, in itself, misleading, does not require a reversal of the judgment, where, as here, other instructions specifically stating the law applicable to the facts appear in the record. *Gentry v. Gentry*, 202 Ill. 444; *White v. White*, 199 Ill. 251. Error in instruction in the language of the statute upon other grounds stated in this case, is not error. (*Feeling v. Feeling*, 222 Ill. 311.) Similarly it is not error the modification of other instructions by deleting reference to pecuniary

benefits and due care of plaintiff's intestate. The matter omitted is covered by other given instructions.

While it seems inevitable that minor errors will creep into every contested trial, such errors are not sufficient for reversal where there has been a fair trial and substantial justice has been done. We find no reversible error in the record. The judgment of the Circuit Court is therefore affirmed.

Judgment affirmed.

benefits and the cause of the investigation. The matter raised
is covered by other provisions.

While it seems unlikely that minor errors will arise from
every contested trial, such errors are not sufficient for reversal
where there has been a fair trial and substantial justice has been
done. We find no reversible error in the record. The judgment of
the Circuit Court is therefore affirmed.

Reversed and affirmed.

STATE OF ILLINOIS, }
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court,
in and for said Second District of the State of Illinois, and the keeper of the Records and Seal
thereof, do hereby certify that the foregoing is a true copy of the _____

_____ *opinion* _____
of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this 26th day of
March in the year of our Lord one thousand
nine hundred and thirty-four.

Justus L. Johnson
Clerk of the Appellate Court

41474

NATHAN GORDON,
(Plaintiff) Appellant,

v.

HENRY M. PETERS and EDWARD
GREGORY,
Defendants.

HENRY M. PETERS,
(Defendant) Appellee.

18-76
APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

313 I.A. 261¹

MR. PRESIDING JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

An action for damages for personal injuries sustained by plaintiff as a result of an accident which occurred on October 17, 1936, when Edward Gregory, defendant, driving an automobile owned by Henry M. Peters, defendant, crashed into a parked car, causing it to move forward so that it struck plaintiff and seriously injured him. The case was tried before the court and a jury. Two verdicts were returned by the jury, one finding defendant Gregory guilty and assessing plaintiff's damages in the sum of \$5,000, and another finding defendant Peters guilty and assessing plaintiff's damages in the sum of \$10,000. Judgments were entered on both verdicts. On plaintiff's motion the judgment against Gregory was vacated and the cause dismissed as to him. At the close of the evidence defendant Peters made a motion for a directed verdict, and ruling thereon was reserved by the court. After the entry of judgment against him Peters made a motion for judgment notwithstanding the verdict, and also made a motion for a new trial. Some time later the trial court entered a judgment vacating the judgment that had been entered against Peters, and entered judgment in favor of defendant Peters notwithstanding the verdict. Plaintiff appeals.

That plaintiff was in the exercise of due care and caution for his own safety at the time of the accident and that

41474

NATHAN LONDON,
(Plaintiff), Appellant,

v.

HENRY M. PETERS and EDWARD
GREGORY,
Defendants.

HENRY M. PETERS,
(Defendant), Appellee.

APPEAL FROM SUPERIOR COURT
OF GOOD COUNTY.

3031A 581

MR. PRESIDING JUSTICE JOSEPH DELIVERED THE OPINION OF THE COURT.

An action for damages for personal injuries sustained by plaintiff as a result of an accident which occurred on October 17, 1936, when Edward Gregory, defendant, driving an automobile owned by Henry M. Peters, defendant, crossed into a parked car, causing it to move forward so that it struck plaintiff and seriously injured him. The case was tried before the court and a jury. Two verdicts were returned by the jury, one finding defendant Gregory guilty and assessing plaintiff's damages in the sum of \$2,000, and another finding defendant Peters guilty and assessing plaintiff's damages in the sum of \$10,000. Judgments were entered on both verdicts. On plaintiff's motion the judgment against Gregory was vacated and the cause dismissed as to him. At the close of the evidence defendant Peters made a motion for a directed verdict, and ruling thereon was reserved by the court. After the entry of judgment against him Peters made a motion for judgment notwithstanding the verdict, and also made a motion for a new trial. Some time later the trial court entered a judgment vacating the judgment that had been entered against Peters, and entered judgment in favor of defendant Peters notwithstanding the verdict. Plaintiff appeals.

That plaintiff was in the exercise of due care and caution for his own safety at the time of the accident and that

he was severely injured through the negligence of defendant Gregory is not disputed. It is agreed that the action of the trial court in entering judgment non obstante veredicto was based upon the theory that plaintiff's evidence proved that Gregory was an independent contractor and not a servant or agent of defendant Peters at the time of the accident. Plaintiff contends that he introduced evidence tending to prove that Gregory, in operating the automobile at the time of the accident, was acting as the agent or servant of Peters. Defendant contends that plaintiff introduced no evidence that tended to prove any relationship between Gregory and Peters "other than that of ~~principal and~~ an independent contractor," and that the trial court so held when he finally entered a judgment non obstante veredicto.

The rules that govern a trial court in passing upon a motion non obstante veredicto are well established. In Cooper v. Safeway Lines, Inc., 304 Ill. App. 302, 312, 313, we said: "The first question presented is whether the trial court erred in entering judgment in favor of defendants notwithstanding the verdicts of the jury in favor of plaintiffs. Rule 22 of the Supreme Court provides: 'The power of the Court to enter judgment notwithstanding the verdict may be exercised in all cases where, under the evidence in the case, it would have been the duty of the Court to direct a verdict without submitting the case to the jury.' A motion to direct a verdict for a defendant preserves for review only the question of law whether from the evidence in favor of plaintiff, standing alone and when considered to be true, together with the inferences which may legitimately be drawn therefrom, a jury might reasonably have found for plaintiff. (Thomason v. Chicago Motor Coach Co., 292 Ill. App. 104; Brophy v. Illinois Steel Co., 242 Ill. 55; City of Chicago v. Jarvis, 226 Ill. 614.) It is only where there is no evidence to sustain a plaintiff's

It is only where there is no evidence to sustain a plaintiff's claim, a jury might reasonably have found for plaintiff. (Thompson v. Chicago Motor Coach Co., 292 Ill. App. 104; Brown v. Illinois Steel Co., 242 Ill. 25; City of Chicago v. Jarvis, 226 Ill. 614.) of plaintiff, standing alone and when considered to be true, together with the inferences which may legitimately be drawn therefrom, review only the question of law whether from the evidence in favor of the Court to direct a verdict without submitting the case to the jury. A motion to direct a verdict for a defendant preserves for of the Court to direct a verdict without submitting the case to the jury, where, under the evidence in the case, it would have been the duty of the Court to direct a verdict in favor of the plaintiff. This is 22 of the Supreme Court provides: "The power of the Court to enter judgment notwithstanding the verdict may be exercised in all cases in entering judgment in favor of defendants notwithstanding the verdicts of the jury in favor of plaintiff. This is 22 of the first question presented is whether the trial court erred in entering judgment in favor of defendants notwithstanding the verdicts of the jury in favor of plaintiff. This is 22 of the v. Gateway Lines, Inc., 304 Ill. App. 302, 312, 313, we said: a motion non obstante veredicto are well established. In Gregory The rules that govern a trial court in passing upon veredicto. court so held when he finally entered a judgment non obstante veredicto, an independent contractor," and that the trial relationship between Gregory and Peters "other than that of that plaintiff introduced no evidence that tended to prove any was acting as the agent or servant of Peters. Defendant contends Gregory, in operating the automobile at the time of the accident, still contends that he introduced evidence tending to prove that agent of defendant Peters at the time of the accident. Plaintiff Gregory was an independent contractor and not a servant or based upon the theory that plaintiff's evidence proved that trial court in entering judgment non obstante veredicto was Gregory is not disputed. It is agreed that the action of the he was severely injured through the negligence of defendant

claim that a judgment may be rendered notwithstanding the verdict. (McCarthy v. Morrison, 283 Ill. App. 129.)" In Thomason v. Chicago Motor Coach Co., *supra*, we said (p. 110): "'A motion to instruct the jury to find for the defendant is in the nature of a demurrer to the evidence, and the rule is that the evidence so demurred to, in its aspect most favorable to the plaintiff, together with all reasonable inferences arising therefrom, must be taken most strongly in favor of the plaintiff. The evidence is not weighed, and all contradictory evidence or explanatory circumstances must be rejected. The question presented on such motion is whether there is any evidence fairly tending to prove the plaintiff's declaration. In reviewing the action of the court of which complaint is made we do not weigh the evidence, - we can look only at that which is favorable to appellant. Yess. v. Yess, 255 Ill. 414; McCune v. Reynolds, 288 id. 188; Lloyd v. Rush, 273 id. 489." (Hunter v. Troup, 315 Ill. 293, 296, 297.)' (Mahan v. Richardson, 284 Ill. App. 493, 495.)" In Walaite v. C. & N. Ry. Co., 376 Ill. 59, the Supreme court stated (pp. 61, 62): "On a motion for judgment notwithstanding the verdict, in the trial court, and on an appeal from a judgment of the trial court granting such motion, the question presented is whether there is any evidence, which, taken with its intendments most favorable to appellee, tends to prove the charge of the complaint. (Sycamore Preserve Works v. Chicago and Northwestern Railway Co., *supra*; Miles v. Long, 342 Ill. 589; Leighton & Howard Steel Co. v. Snell, 217 id. 152.) If there is in the record evidence, which, standing alone, tends to prove the material allegations of the complaint, a motion for judgment notwithstanding the verdict, should be denied, even though upon the entire record the evidence may preponderate against the plaintiff so that the verdict in his favor cannot stand when tested by a motion for a new trial. Libby, McNeill & Libby

when tested by a motion for a new trial. Id. McCall v. Liberty
against the plaintiff so that the verdict in his favor cannot stand
even though upon the entire record the evidence may preponderate
a motion for judgment notwithstanding the verdict, should be denied,
alone, tends to prove the material allegations of the complaint,
217 14. 152.) If there is in the record evidence, when standing
Wiles v. Borg, 342 Ill. 509; Wright v. Board of Trustees, 342 Ill.
Preserve Works v. Chicago and Northwestern Railway Co., 342 Ill.
appelee, tends to prove the charge of the complaint. (See
any evidence, which, taken with its inferences most favorable to
granting such motion, the question presented is whether there is
trial court, and on an appeal from a judgment of the trial court
"On a motion for judgment notwithstanding the verdict, in the
8 P. Hy. Co., 376 Ill. 59, the Supreme court stated (291 Ill. 489):
v. Richardson, 284 Ill. 493, 495." In Id. v. Id., 284 Ill. 493,
111. 414; McCall v. Liberty, 283 Ill. 158; Id. v. Id., 277
only at that which is favorable to appellant. Id. v. Id., 277
which complaint is made we do not weigh the evidence, - we can look
plaintiff's declaration. In reviewing the action of the court of
is whether there is any evidence fairly tending to prove the
stances must be rejected. The question presented on such motion
not weighed, and all contradictory evidence on explanatory circum-
taken most strongly in favor of the plaintiff. The evidence is
together with all reasonable inferences arising therefrom, must be
to demand so, in its aspect most favorable to the plaintiff, be-
of a doubt as to the evidence, and the rule is that the evidence
to instruct the jury to find for the defendant is in the nature
v. Id. v. Id. v. Id., 277, 278; Id. v. Id., 277, 278; Id. v. Id., 277, 278;
dict. (McCall v. Liberty, 283 Ill. 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 84

v. Cook, 222 Ill. 206."

In passing upon plaintiff's contention that he introduced evidence tending to prove that Gregory, in operating the automobile at the time of the accident, was acting as the agent or servant of Peters, the following evidence must be considered:

On October 17, 1936, defendant Gregory was employed at the "Waggoner Greasing Palace," at 63d and Whipple streets, washing, greasing and simonizing cars. About 9 o'clock a. m., defendant Peters, in his car, stopped at the back door of the place to have his car washed, greased and simonized. Gregory testified that he had never met Peters before that day; that when Peters got out of his car he stated that he wanted the car "washed, greased and simonized;" that he asked how much it would cost, and Gregory answered, "five and one-half;" that Peters then brought the car behind the garage and asked Gregory if he would simonize the car any cheaper than \$5.50, to which Gregory answered that he would do it for three dollars; that Peters then said, "Will you go home with me," to which Gregory answered, "No, I can do it right back of the garage;" that Peters then said, "All right," and "he pulled his car right up in the vacant lot, right up in the alley right opposite the garage;" that Gregory then said, "I haven't enough to do the job with," to which Peters replied, "What are you lacking?" that Gregory answered, "I have to have some more wax, some rags and some cleaner;" that Peters said: "'You got any money?' and I said, 'No.' So he gave me a dollar;" that Gregory then said, "I got rags over at the house," and Peters said, "Here are the keys. You take the keys and the car and go on over and get the rags, the wax and the cleaner, but just be through with the car about two o'clock, because I will be back for it about two or two-thirty;" that as he walked away he said, "Be sure and be through with it." Gregory further testified that after he had

In passing upon this defendant's contention that he introduced evidence tending to prove that Gregory, in operating the automobile at the time of the accident, was acting as the agent or servant of Peters, the following evidence must be considered: On October 17, 1936, defendant Gregory was employed at the "Argonne Greasing Palace," at 63d and Michigan streets, washing, greasing and oiling cars. About 9 o'clock a. m. defendant Peters, in his car, stopped at the back door of the place to have his car washed, greased and oiled. Gregory testified that he had never met Peters before that day; that when Peters got out of his car he stated that he wanted the car "washed, greased and oiled"; that he asked how much it would cost, and Gregory answered, "Five and one-half"; that Peters then brought the car behind the garage and asked Gregory if he would oil the car any cheaper than \$5.50, to which Gregory answered that he would do it for three dollars; that Peters then said, "Will you go home with me," to which Gregory answered, "No, I can do it right back of the garage"; that Peters then said, "All right," and "he pulled his car right up in the vacant lot, right up in the alley right opposite the garage"; that Gregory then said, "I haven't enough to do the job with," to which Peters replied, "What are you lacking?" that Gregory answered, "I have to have some more wax, some rags and some oil"; that Peters said: "You got any money?" and I said, "No." So he gave me a dollar; that Gregory then said, "I got rags over at the house," and Peters said, "Here are the keys. You take the keys and the car and go on over and get the wax, the oil and the oiler, but just be thorough with the car about two o'clock, because I will be back for it about two or two-thirty"; that as he walked away he said, "Be sure and be thorough with it." Gregory further testified that after he had

worked on Peters' car for about an hour and a half he got in the car and drove to his home at 5541 LaFayette avenue to get the rags; that he got the rags there and then went to Pick's hardware store, at 55th and Michigan avenue, and bought two cans of simonizing material; that he was driving back to the garage to finish the work on the Peters car when the accident happened; that he used the car for the sole purpose of getting the rags and simonizing material that were to be used upon the Peters car. William Larson, the manager of the Waggoner Greasing Palace, testified that about 3 or 4 o'clock in the afternoon of October 17, 1936, he told Peters that his car had been in an accident, to which Peters answered "that he was sorry that he sent Gregory with his car to get the rags, the material, and the wax," and that "he was going down to the police station and bail Mr. Gregory out." Peters, testifying in his own behalf, stated that when he left Gregory he told him that he would be back in an hour and a half or two hours to see how he was getting along with the work. The following occurred in the cross-examination of Peters: "Q. Now, in the deposition at my office on January 19, 1939, let me ask you first, did you tell Gregory you would come back to see how he was coming with the job? A. I did, yes. Q. You told him that. Did you make this answer to this question: 'Q. When were you going to come back for your car?' 'A. I told him in about an hour and a half or two hours, that is what I told him. I wanted to show up there a little sooner, I wanted to see if he was working on the car.' The Witness: A. Yes."

The aforesaid evidence, with all of its reasonable inferences, shows that Peters hired Gregory to simonize the car; that he told Gregory that he must be sure and be through the work on the car about two o'clock; that Gregory told Peters that he had to have some more wax, some rags and some cleaner to complete the job and

that he had rags over at his home; that Peters asked Gregory if he had any money and Gregory said, "No," whereupon Peters gave Gregory a dollar, at the same time saying to Gregory, "Here are the keys. You take the keys and the car and go on over and get the rags, the wax and the cleaner, but just be through with the car about two o'clock, because I will be back for it about two or two-thirty;" that Peters handed the keys of the car to Gregory; that Gregory later got in the car and drove it to his home, where he got some rags, and then drove to the hardware store, where he purchased two cans of simonizing material, and then started back to the Waggoner Greasing Palace for the purpose of completing his work on the car, and that while he was on his way back to Waggoner's the accident occurred; that the only purpose for which he used the car was to obtain rags and simonizing material to be used on the Peters car.

It appears, therefore, that at the time of the accident Gregory was driving Peters' car, at the latter's direction, on an errand that Peters had directed Gregory to perform, the purposes of the errand being directly connected with the services that Peters had hired Gregory to perform upon the car; that Peters had Gregory use the car in order to hasten the completion of the work upon it so that Peters might be able to use the car about two or two-thirty o'clock p. m. Under such circumstances Gregory at the time of the accident was acting as the agent or servant of Peters. The trial court therefore erred in entering the judgment in favor of defendant Peters notwithstanding the verdict of the jury.

Defendant Peters contends that if we do not affirm the decision of the trial court then in our judgment order reversing and remanding the cause we should also pass upon defendant's motion for a new trial. Motions for new trials are addressed to the nisi prius court and in the absence of disposition of it by that court the Appellate court has no jurisdiction to pass upon such a

that he had keys over at his home; that Peters called Gregory if he had any money and Gregory said, "No," because he had a dollar, at the same time saying to Gregory, "Don't get the keys. You take the keys and the car and go on over and get the keys, the tax and the cleaner, but just be friendly with the car about two o'clock, because I will be back for it about two or two-thirty;" that Peters handed the keys of the car to Gregory; that Gregory later got in the car and drove it to his home, where he got some keys, and then drove to the hardware store, where he purchased two cans of sandblasting material, and then started back to the Western Dressing Palace for the purpose of completing his work on the car, and that while he was on his way back to "Agnew's" the accident occurred; that the only purpose for which he used the car was to obtain tools and sandblasting material to be used on the Peters car.

It appears, therefore, that at the time of the accident Gregory was driving Peters' car, as the latter's direction, on an errand that Peters had directed Gregory to perform, the purpose of the errand being directly connected with the business that Peters had hired Gregory to perform upon the car; that Peters had Gregory use the car in order to hasten the completion of the work upon it so that Peters might be able to use the car about two or two-thirty o'clock, p. m. Under such circumstances Gregory at the time of the accident was acting as the agent or servant of Peters. The trial court therefore erred in entering the judgment in favor of defendant Peters notwithstanding the verdict of the jury.

Defendant Peters contends that if he do not affirm the decision of the trial court made in our judgment either reversing and remanding the cause or should also pass upon defendant's motion for a new trial. Motions for new trials are addressed to the right trial court and in the absence of objection of it by that court the appellate court has no jurisdiction to pass upon such a

motion. (See Herb v. Pitcairn, 377 Ill. 405. See, also, Walaite v. C., R. I. & P. Ry. Co., supra.)

The judgment of the Superior court of Cook county is reversed and the cause is remanded with directions to the trial court to pass upon defendant Peters' motion for a new trial, and for further proceedings not inconsistent with this opinion.

JUDGMENT REVERSED AND CAUSE
REMANDED WITH DIRECTIONS.

Sullivan and Friend, JJ., concur.

41933

HERBERT H. NABERS,
Appellee,

v.

BERYL JACOBSON,
Appellant.

APPEAL FROM MUNICIPAL

COURT OF CHICAGO.

313 I.A. 261²

MR. PRESIDING JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

Defendant appeals from a judgment order overruling his motion and petition to vacate a judgment entered against him on March 21, 1941, in the sum of \$932.74. Defendant asks that the judgment order denying his motion and petition be reversed and that the cause be remanded with directions to vacate the judgment entered against him on March 21, 1941.

Plaintiff sued to recover a balance, \$932.74, alleged to be due him from defendant on account of the sale by plaintiff to defendant of 365 shares of common capital stock of Tyson Beverages, Ltd. at five dollars per share. Plaintiff claimed that the balance was due him after he had given defendant credit for \$593.50, which amount was due defendant as a bonus from said company upon said stock and which was paid to plaintiff to apply on the unpaid balance, and also, after plaintiff had given defendant credit for \$350, the amount for which the stock sold at public auction. Defendant, as his sole defense, alleged that the sale of the stock was made in violation of the Illinois Securities Law; that the shares of stock were securities in Class "C" or "D" within the meaning of the said law; that said shares of stock were never qualified for sale as required by the said law; that the sale by plaintiff to defendant was made in violation of the said law and was therefore void; and that defendant, as purchaser of the stock, has elected and elects to declare the sale by plaintiff to defendant null and void. Defendant filed a

HERBERT K. HANCOCK
Appellee
v.
HENRY JACOBSON
Appellant

STATE OF ILLINOIS

COURT OF COMMONS

85314301

THE PRESIDING JUDGE OF THE COURT

Defendant appeals from a judgment order overruling his motion and petition to vacate a judgment entered against him on March 21, 1941, in the case of 1935-74. Defendant asks that the judgment order denying his motion and petition be reversed and that the cause be remanded with directions to vacate the judgment entered against him on March 21, 1941. Plaintiff asks to recover a balance, 1935-74.

alleged to be due him from defendant on account of the sale by plaintiff to defendant of 357 shares of common capital stock of

Tyson Beverages, Ltd., at five dollars per share. Plaintiff claimed that the balance was due him after he had given defendant credit for \$293.70, which amount was the defendant's share from said company upon said stock and which was paid to plaintiff to apply on the unpaid balance, and also, after plaintiff had given defendant credit for \$350, the amount for which the stock was sold at public auction. Defendant, as his sole defense, alleged that the sale of the stock was made in violation of the Illinois Securities Law; that the shares of stock were securities in Class "C" or "D" within the meaning of the said law; that said shares of stock were never qualified for sale as required by the said law; that the sale by plaintiff to defendant was made in violation of the said law and was therefore void; and that defendant, as purchaser of the stock, was estopped and elected to decline the sale by plaintiff to defendant and void. Defendant filed a

counterclaim for \$593.50 in which he alleges that the shares of stock were securities in Class "C" or Class "D" within the meaning of the Illinois Securities Law; that the shares were never qualified for sale as required by the said law, and that the sale thereof by plaintiff to defendant was made in violation of the said law and was therefore void; that defendant paid to plaintiff \$593.50 on account of the purchase price of the stock. Plaintiff in his answer to defendant's statement of defense and in his answer to the counterclaim denied that the sale was made in violation of the Illinois Securities Law, and that the transaction was void. The judgment order entered March 21, 1941, reads as follows:

"Now comes the plaintiff in this cause, the defendant being absent and not represented, and thereupon this cause comes on in regular course for trial, before the Court, without a jury, and the Court having heard the evidence and the arguments of counsel and being fully advised in the premises enters the following finding, to-wit:- 'The Court Finds the Issues Against the Defendant, Beryl Jacobson, and Assesses the Plaintiff's Damages at the Sum of Nine Hundred Thirty-two and 74/100 Dollars.' This cause coming on for further proceedings herein, it is considered by the court that the plaintiff have judgment on the finding herein and that the plaintiff have and recover of and from the defendant, Beryl Jacobson, the damages of the plaintiff amounting to the sum of Nine Hundred Thirty-Two and 74/100 Dollars in form as aforesaid assessed, together with the costs by the plaintiff herein expended and that execution issue therefor. And it is further ordered by the Court that the Counter-Claim herein be and the same is hereby dismissed."

It appears that the judgment was entered upon the preliminary call of the trial call; that defendant's attorney reached

countersclaim for \$593.75 in which he alleges that the shares of stock were recaptured in class "C" or class "D" within the meaning of the Illinois Securities Law; that the shares were never qualified for sale as required by the said law, and that the sale thereof by plaintiff to defendant was made in violation of the said law and was therefore void; that defendant paid to plaintiff \$593.75 on account of the purchase price of the stock. Plaintiff in his answer to defendant's statement of defense and in his answer to the countersclaim denied that the sale was made in violation of the Illinois Securities Law, and that the transaction was void. The judgment entered March 21, 1941, reads as follows:

"Now comes the plaintiff in this cause, the defendant being absent and not represented, and thereupon this cause comes on in regular course for trial, before the court, without a jury, and the court having heard the evidence and the arguments of counsel and being fully advised in the premises enters the following finding, to-wit:- 'The Court finds the issues against the Defendant, Deryl Jacobson, and assesses the Plaintiff's damages at the sum of Nine Hundred Thirty-Two and 74/100 Dollars.' This cause coming on for further proceedings herein, it is considered by the court that the plaintiff have judgment on the finding herein and that the plaintiff have and recover of and from the defendant, Deryl Jacobson, the amount of the plaintiff's claim amounting to the sum of Nine Hundred Thirty-Two and 74/100 Dollars in form as aforesaid assessed, together with the costs by the plaintiff herein expended and that execution issue therefor. And it is further ordered by the Court that the Counter-Claim herein be and the same is hereby dismissed."

It appears that the judgment was entered upon the preliminary call of the trial call; that defendant's attorney reached

the court room before the second call of the cases, and that upon the second call the trial court informed defendant's counsel that judgment had been entered on the preliminary call; that the trial court informed counsel that he could not disturb the judgment in the absence of plaintiff's counsel and that defendant's counsel should serve notice on opposing counsel. On March 24, 1941, after notice to plaintiff's counsel, a verified petition to vacate the judgment was filed. The petitioner, Ward C. Swalwell, attorney for defendant, alleged that the cause came on for hearing on March 7, 1941, and was continued to April 14, 1941; that "since said date he has been confined to his home because of illness; that an associate attorney of your petitioner had been handling the above matter during the illness of your petitioner and that said attorney called your petitioner on the phone on the evening of March 20th, notifying him that the cause was to be heard on the morning of March 21 in Room 1105 City Hall; * * * that on his way to court on the morning of March 21st, 1941 he was unavoidably detained because of trouble with his car; that he arrived in said Court Room about fifteen minutes late at which time he learned that a judgment in the amount of \$932.74 and costs had been entered against the defendant; * * * that he has a good and meritorious defense in this cause which is as follows: That the defendant rescinded the contract on the grounds that said stock was never qualified under the Illinois Security Law, Section 4 and that said shares of stock were not sold by the plaintiff to this defendant in an exempt transaction within the meaning of Section 5 of the Illinois Security Law; that said shares of stock are securities in Class C or D within the meaning of the said Illinois Security Law and that said sale was made in violation of the Illinois Security Law and therefore void. * * * Wherefore your petitioner prays that he may

the court room before the second call of the cases, and that upon the second call the trial court informed defendant's counsel that judgment had been entered on the plaintiff's claim; that the trial court informed counsel that he could not discuss the judgment in the absence of plaintiff's counsel and that defendant's counsel should serve notice on opposing counsel. On March 24, 1941, after notice to plaintiff's counsel, a verified petition to vacate the judgment was filed. The petition, dated March 24, 1941, recited that the case came on for hearing on March 7, 1941, and was continued to April 14, 1941; that since said date he has been confined to his home because of illness; that an associate attorney of your petitioner had been handling the above matter during the illness of your petitioner and that said attorney called your petitioner on the phone on the evening of March 20th, notifying him that the case was to be heard on the morning of March 21 in Room 115 City Hall; * * * that on this way to court on the morning of March 21st, 1941 he was unavoidably detained because of trouble with his car; that he arrived in said Court Room about fifteen minutes late at which time he learned that a judgment in the amount of \$925.74 and costs had been entered against the defendant; * * * that he has a good and meritorious defense in this case which is as follows: That the defendant rescinded the contract on the ground that said stock was never qualified under the Illinois Security Law, Section 4 and that said shares of stock were not sold by the plaintiff to this defendant in an exempt transaction within the meaning of Section 3 of the Illinois Security Law; that said shares of stock were securities in Class C or D within the meaning of the said Illinois Security Law and that said sale was made in violation of the Illinois Security Law and therefore void. * * * Therefore your petitioner prays that he may

be given an opportunity to present his defense in this matter and that the judgment entered against the defendant on March 21, 1941, be vacated, set aside and held for naught, and that the cause be set for an early hearing to be set by this Court." Plaintiff made no motion to strike the petition. When it came on for hearing on March 24, the trial court, upon his own motion, continued the hearing until April 18, 1941, at the same time stating: "At that time I will require the defendant to show that he has a good defense to this action and unless he does so, I will not vacate the judgment." After several further continuances the matter came on for hearing on April 28, 1941, at which time the following occurred:

"Mr. Gladstone [attorney for defendant]: This matter is before your Honor on a Petition to vacate a default judgment. On the day the Petition was filed, your Honor told my associate, Mr. Swilwell, that you would vacate the judgment if he showed you that the Defendant had a good defense to Plaintiff's claim. The Defendant claims that the securities alleged to have been sold to him, were not qualified for sale in the State of Illinois under the Illinois Securities Law and that the Defendant elected to declare the said sale void. We now offer a Certificate of Non-Compliance issued by the Secretary of the State of Illinois, under the seal of the State of Illinois, certifying that no statement of Tyson Beverages, Ltd. was filed by the Secretary of State of the State of Illinois, under the Illinois Securities Law.

"The Court: It may be received, let me see it (reading). The said Certificate of Non-Compliance is in words and figures as follows:

"IN THE OFFICE
OF THE
SECRETARY OF STATE
OF THE

of given an opportunity to present his defense in this case, and that the judgment entered against the defendant on March 21, 1941, be vacated, set aside and held for nemo, and that the cause be set for an early hearing to be set by this Court. Plaintiff made no motion to strike the petition. When it came on for hearing on March 24, the trial court, upon his own motion, continued the hearing until April 15, 1941, at the same time stating: "At that time I will require the defendant to show that he has a good defense to this action and unless he does so, I will not vacate the judgment." After several further continuances the matter came on for hearing on April 15, 1941, at which time the following occurred:

"Mr. Elston (attorney for defendant): This matter is before your court on a petition to vacate a default judgment. On the day the petition was filed, your court told my associate, Mr. Galloway, that you would vacate the judgment if he showed you that the defendant had a good defense to plaintiff's claim. The defendant claims that the securities alleged to have been sold to him, were not entitled for sale in the State of Illinois under the Illinois Securities Law and that the defendant alleged to declare the said sale void. He now offers a Certificate of Non-Compliance issued by the Secretary of the State of Illinois, under the seal of the State of Illinois, certifying that no statement of Lyon Beverages, Ltd., was filed by the Secretary of State of the State of Illinois, under the Illinois Securities Law. The Court: It will be received, let me see it (reading). The said Certificate of Non-Compliance is in words and figures as follows:

THE SECRETARY OF STATE
OF THE
STATE OF ILLINOIS

SECURITIES DEPARTMENT

"I, Edward J. Hughes, Secretary of State of the State of Illinois, pursuant to the provisions of Section 37 of the Illinois Securities Law, do hereby certify that no statement of Tyson Beverages, Ltd. under the Illinois Securities Law has been filed by the Secretary of State of the State of Illinois, as therein provided, to qualify for sale in Illinois any securities of said Tyson Beverages, Ltd., and that no securities of Tyson Beverages, Ltd. have been otherwise registered by said Secretary of State under the Illinois Securities Law for sale in this State, as therein provided.

"In Witness Whereof, I have hereunto set my hand and affixed the Great Seal of the State of Illinois, this 17th day of April, 1941.

"(Signed) Edward J. Hughes,
"Secretary of State.

"The Court: I do not think this constitutes a sufficient defense.

"Mr. Gladstone: The Illinois Securities Law provides that the Certificate of Compliance or Non-Compliance of the Secretary of State is prima facie evidence of the facts stated therein. This Certificate of Non-Compliance is prima facie evidence of the allegations in our Statement of Defense and Counter-Claim. Under the law, the burden now shifts to the Plaintiff to prove that the sale was made in conformance with the Illinois Securities Law, or that it came within one of the exceptions. That is, that the securities sold were Class A, exempt securities, or that the transaction was in Class B, and hence, also exempt. The recent case of People v. Wilson is the last authority on the point.

"Mr. Woodward [attorney for plaintiff]: This proceeding is just being used for delay. Mr. Gladstone is the fourth lawyer

COMPLAINT

"I, Edward J. Hughes, Secretary of State of the State of Illinois, pursuant to the provisions of Section 17 of the Illinois Securities Law, do hereby certify that no statement of Tyson Beverages, Ltd., under the Illinois Securities Law has been filed by the Secretary of State of the State of Illinois, as therein provided, to qualify for sale in Illinois any securities of said Tyson Beverages, Ltd., and that no securities of Tyson Beverages, Ltd., have been otherwise registered by this Secretary of State under the Illinois Securities Law for sale in this State, as therein provided.

"In witness whereof, I have hereunto set my hand and affixed the Great Seal of the State of Illinois, this 17th day of April, 1941.

(Signed) Edward J. Hughes,
Secretary of State.

"The Court: I do not think this constitutes a sufficient

defense.

"Mr. Gladstone: The Illinois Securities Law provides

that the Certificate of Compliance or Non-compliance of the Secretary of State is prima facie evidence of the facts stated therein. This Certificate of Non-compliance is prima facie evidence of the allegations in our statement of defense and counter-claim. Under the law, the burden now shifts to the plaintiff to prove that the sale was made in compliance with the Illinois Securities Law, or that it came within one of the exceptions. That is, that the securities sold were Class A, exempt securities, or that the transaction was in Class B, and hence, also exempt. The present case of People v. Wilson is the last authority on the point.

"Mr. Woodard [counsel for plaintiff]: This proceeding is just being used for delay. Mr. Gladstone is the former lawyer

in the case. Chapman & Cutler, who were the lawyers for the Defendant before Mr. Swalwell or Mr. Gladstone came into the case, told me that they did not think that the Defendant had a good case and wrote me a letter consenting to a judgment. This firm is considered the best lawyers on Blue Sky Laws in the City.

"The Court: I do not see how I can disturb a consent judgment. A consent judgment is one of the most sacred things in the law, and besides, you have one of the best firms in Chicago who state that the Defendant hasn't a good defense and consents to a judgment."

"Mr. Gladstone: Maybe that was the reason why the Defendant changed lawyers. We are not concerned, however, with that judgment, because the Plaintiff's attorneys stipulated to set that judgment aside and the Statements of Chapman & Cutler are not admissible in this case. We are only concerned with the last default judgment. On the day it was entered, Mr. Swalwell's automobile broke down on the Outer Drive. He got into Court before the second call and when the cases were called a second time, he stepped up to the Court and was informed that a judgment had been entered on the first call. You remember that you told him that you could not disturb the judgment that was entered without notifying the other side and you suggested to him that he serve notice on opposing counsel, which he did immediately.

"The Court: No, I won't disturb the judgment. Motion and Petition to set aside and vacate the default order and judgment is denied."

Thereupon the court entered a judgment order, dated April 28, 1941, overruling defendant's motion "to vacate Ex Parte finding, judgment and dismissal of counter-claim."

It is clear that the trial court, in passing upon the petition, was confused by the statement made by plaintiff's

in the case. Chapman, Galtier, who were the lawyers for the
Defendant before Mr. Welles in or Mr. Gladstone came into the
case, told me that they did not think that the Government had a
good case and wrote me a letter consenting to a judgment. This
firm is considered the best lawyers on the day in the city.
"The Court: I do not see how I can give a judgment."

judgment. A consent judgment is one of the most common judgments
in the law, and I think you have one of the best firms in Chicago
who state that the Defendant hasn't a good case and the Government is
a judgment.

"Mr. Gladstone: I say that was the reason why the
Defendant changed lawyers. He was not concerned, however, with
that judgment, because the Plaintiff's attorney is obligated to
set that judgment aside and the statements of Chapman & Galtier
are not admissible in this case. He was only concerned with the
last default judgment. On the day it was entered, Mr. Welles's
automobile broke down on the Court square. He got into Court before
the second call and when the cases were called a second time, he
stepped up to the Court and was informed that a judgment had been
entered on the first call. You remember that you told him that
you could not disturb the judgment that was entered without notify-
ing the other side and you suggested to him that he serve notice
on opposing counsel, which he did immediately."

"The Court: No, I won't disturb the judgment. Motion
and petition to set aside and vacate the default order and judg-
ment is denied."

Thereupon the Court entered a judgment order, dated
April 28, 1941, overruling defendant's motion "to vacate the
finding, judgment and dismissal of counter-claim."
It is clear that the trial court, in passing upon the
petition, was confused by the statement made by Plaintiff's

counsel. The record shows that the judgment was not a consent judgment. Plaintiff, in his brief, states that it was entered because defendant was not represented by counsel when the case was called for trial. The trial court, in ruling upon the petition, seems to have been governed by the statement of plaintiff's counsel that certain lawyers who formerly represented defendant / told him that "they did not think that the defendant had a good case and wrote me a letter consenting to a judgment. This firm is considered the best lawyers on Blue Sky Laws in the City." The record shows that the firm in question withdrew as counsel for defendant on March 7, 1941. It is, of course, impossible to approve the reasons given by the trial court in denying the petition. The issue before the trial court was a simple one: whether the sale was made in violation of the Illinois Securities Law. Defendant alleged that it was in violation of that law. Plaintiff, in his statement of claim and in his answer to the counterclaim, denied that the sale was made in violation of that law. He did not reply or defend on the ground that the sale was a Class "A" security or that it was an exempt Class "B" transaction. He did not deny defendant's allegations that the securities were Class "C" or Class "D" securities, and these allegations were therefore admitted. Under the state of the pleadings plaintiff's defense that the sale was not made in violation of the Illinois Securities Law amounted to a claim that he had complied with the provision of the Act requiring securities of either Class "C" or Class "D" to be registered with the Secretary of State before being offered for sale. Upon the instant hearing before the trial court defendant introduced a certificate of the Secretary of State which showed "that no statement of Tyson Beverages, Ltd. under the Illinois Securities Law has been filed by the Secretary of State of the State of Illinois, as therein

by the Secretary of State of Illinois, as therein
 beverages, food, under the Illinois Securities Law has been filed
 the Secretary of State which showed "that no statement of Lyon
 before the trial court defendant introduced a certificate of
 state before being offered for sale. Upon the instant hearing
 Class "C" or Class "D" as he registered with the Secretary of
 with the provision of the act relating securities of Illinois
 Illinois Securities Law amounted to a claim that he had complied
 with the balance that the sale was not made in violation of the
 were therefore admitted. Under the state of the plaintiff plain-
 were Class "C" or Class "D" securities, and these allegations
 tion. He did not deny defendant's allegations that the securities
 a Class "C" or Class "D" security or that it was an exempt class "B" security.
 law. He did not reply or deny on the ground that the sale was
 countervailing, denied that the sale was made in violation of that
 Plaintiff, in his statement of claim and in his answer to the
 law. Defendant alleged that it was in violation of that law.
 whether the sale was made in violation of the Illinois Securities
 petition. The facts before the trial court were a simple one:
 to approve the reasons given by the trial court in denying the
 for defendant on March 7, 1941. It is, of course, impossible
 The record shows that the firm in question withdrew as counsel
 is considered the best lawyers on this day in the city."
 case and wrote me a letter concerning to a judgment. This firm
 told him that "they did not think that the defendant had a good
 defendant's counsel that certain lawyers who formerly represented
 petition, seems to have been governed by the statement of
 was called for trial. The trial court, in ruling upon the
 because defendant was not represented by counsel with the case
 judgment. Plaintiff, in his brief, stated that it was entered
 counsel. The record shows that the judgment was not a consent

provided, to qualify for sale in Illinois any securities of said Tyson Beverages, Ltd., and that no securities of Tyson Beverages, Ltd. have been otherwise registered by said Secretary of State under the Illinois Securities Law for sale in this State, as therein provided." When defendant introduced the certificate he made out a prima facie defense to plaintiff's statement of claim and also a prima facie case as to his counterclaim (See Taft v. Otte & Co., 274 Ill. App. 280; People v. Wilson, 375 Ill. 506, affirming 306 Ill. App. 216), and the trial court erred in denying defendant's petition to set aside the judgment order of March 21, 1941. Had the trial court set aside the judgment he might, in a few minutes, have determined the cause upon the merits.

Plaintiff contends that the judgment may be sustained upon the ground that defendant's counsel was negligent, and calls attention to the fact that the cause was reached for trial on September 13, 1940, and that judgment was entered in favor of plaintiff and against defendant at that time, and that the judgment order shows that it was entered because defendant was not represented by counsel when the case was called for trial. For aught that appears in this record the first judgment may have been inadvertently entered, because plaintiff stipulated that it should be set aside. As to the instant judgment, the trial court apparently realized that it could not be sustained upon the ground that defendant's counsel was negligent, and his denial of the petition to vacate was not based upon that ground. Indeed, the second judgment was entered upon the preliminary call, and we take judicial notice of the fact that it is not the practice in the Municipal court of Chicago or in any of our local courts to enter judgment upon the preliminary call. In Hogan v. Ermovick, 335 Ill. 181, 183, the court states: "While it is highly commend-

provided, to qualify for sale in Illinois only, provided of
said Tyson Beverages, Ltd., and that no restriction of Tyson
Beverages, Ltd., have been otherwise restricted by said Secretary
of State under the Illinois restriction law for sale in this State,
as therein provided." The defendant introduced the certificate
he made out a grain license in Illinois' statement of
claim and also a grain license as to his contract with 1899
Tate v. State & Co., 174 Ill. 407, 1905; People v. Illinois, 375
Ill. 506, affirming 335 Ill. 107, 110, 111, and the trial court
erred in denying defendant's petition to set aside the judgment
order of March 21, 1941. And the trial court was also in error
when he ruled, in a few minutes, have determined the case upon
the merits.

Plaintiff contends that the judgment may be reversed
upon the ground that defendant's counsel was negligent, and calls
attention to the fact that the same was reversed for trial on
September 17, 1940, and that judgment was entered in favor of
plaintiff and against defendant on that date, and that the judg-
ment order shows that it was entered because defendant was not
represented by counsel when the case was called for trial. For
aught that appears in this record of the first judgment may have
been inadvertently entered, because plaintiff failed to move
it should be set aside, as to the instant judgment, the trial
court apparently realized that it could not be reversed upon
the ground that defendant's counsel was negligent, and the denial
of the petition to vacate was not based upon that ground. Indeed,
the second judgment was entered upon the preliminary call, and
we have judicial notice of the fact that it is not the practice
in the judicial court of Chicago or in any of our local courts
to enter judgment upon the preliminary call. In Ill. v. People, 335
Ill. 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

able to dispose of causes with celerity and dispatch it is more important that justice be done, and where for any good reason a defendant has been unable to present his defense, a court of law will set aside a judgment obtained ex parte and order a new trial. McMurray v. Peabody Coal Co., 281 Ill. 218; City of Moline v. Chicago, Burlington and Quincy Railroad Co., 262 id. 52; Mason v. McNamara, 57 id. 274."

The judgment order of the Municipal court of Chicago, dated April 28, 1941, is reversed, and the cause is remanded with directions to the trial court to vacate the judgment order of the Municipal court of Chicago dated March 21, 1941, and for further proceedings not inconsistent with this opinion.

JUDGMENT ORDER DATED APRIL 28, 1941,
REVERSED, AND CAUSE REMANDED WITH
DIRECTIONS TO VACATE JUDGMENT ORDER
DATED MARCH 21, 1941, ETC.

Sullivan and Friend, JJ., concur.

able to dispose of causes with celerity and dispatch it is more
important that justice be done, and hence for any good reason
a defendant has been unable to present his defense, a court of
law will set aside a judgment obtained by default and order a new
trial. McIntyre v. Kennedy Coal Co., 181 Ill. 113; City of
Holmes v. Chicago, Burlington and Quincy Railroad Co., 181 Ill.
125; Mason v. McIntyre, 77 Ill. 274.

The judgment order of the municipal court of Chicago,
dated April 28, 1941, is reversed, and the case is remanded
with directions to the trial court to vacate the judgment order
of the municipal court of Chicago dated March 21, 1941, and for
further proceedings not inconsistent with this opinion.
JUDGMENT ORDER DATED APRIL 28, 1941,
REVERSED, AND CASE REMANDED WITH
DIRECTIONS TO VACATE JUDGMENT ORDER
DATED MARCH 21, 1941, ETC.

Sullivan and Friend, 37, consent.

41546

WIMP PACKING COMPANY, an Illinois Corporation, ROY WIMP, LeROY WIMP and NETTIE WIMP,

Appellees,

v.

ELGY WIMP,

Appellant.

APPEAL FROM CIRCUIT COURT,
COOK COUNTY.

313 I.A. 262

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Wimp Packing Company, an Illinois corporation, whose stock was held principally by Roy Wimp and Elgy Wimp, his brother, brought suit in debt against Elgy Wimp, predicated on an account stated and an open account. Defendant denied the debt and filed a counterclaim for an accounting and liquidation of the corporation, joining the president and other stockholders as counter-defendants. The cause was referred generally to a master, who found the issues in favor of defendant and recommended the entry of a decree in accordance with his findings, including the appointment of a liquidating receiver and the dissolution of the corporation. Pursuant to hearing of exceptions to the master's report, the chancellor, after studying the report for several days, disapproved of the master's findings and conclusions, dismissed defendant's counterclaim, found the issues for plaintiff, and entered judgment in favor of plaintiff and against defendant for \$45,595.07, together with interest thereon from July 13, 1937, to April 23, 1940, amounting to \$6,446.23. Defendant seeks reversal of the decree entered.

The complaint filed July 13, 1937, alleged that defendant Elgy Wimp was connected with the corporation from January 29, 1918, to December 31, 1936, in the capacity of stockholder, officer and director; that during that period, and without authority from plaintiff, willfully, maliciously and with intent to defraud the corporation he took for himself on credit a large

WIMP PACKING COMPANY, an Illinois
Corporation, ROY WIMP, JAMES WIMP
and ELLIS WIMP,

appellants,

v.

ELLY WIMP,

appellant.

THE JUSTICE PRINTER DELIVERED THE DECISION OF THE COURT.

Wimp Packing Company, an Illinois corporation, whose stock

was held principally by Roy Wimp and Elly Wimp, his brother,

brought suit in debt against Elly Wimp, predicated on an account

stated and an open account. Defendant denied the debt and filed

a counterclaim for an accounting and liquidation of the corpor-

ation, joining the president and other stockholders as counter-

defendants. The cause was referred generally to a master, who

found the issues in favor of defendant and recommended the entry

of a decree in accordance with his findings, including the appoint-

ment of a liquidating receiver and the dissolution of the corpor-

ation. Pursuant to hearing of exceptions to the master's report,

the chancellor, after studying the report for several days, dis-

approved of the master's findings and conclusions, stated as

defendant's counterclaim, found the issues for plaintiff, and

entered judgment in favor of plaintiff and against defendant for

\$45,795.07, together with interest thereon from July 13, 1937, to

April 23, 1940, amounting to \$6,446.25. Defendant seeks reversal

of the decree entered.

The complaint filed July 13, 1937, alleged that defendant

Elly Wimp was connected with the corporation from January 23,

1918, to December 31, 1936, in the capacity of stockholder,

officer and director; that during that period, and without

authority from plaintiff, willfully, maliciously and with intent

to defraud the corporation he took for himself on credit a large

amount of goods from the corporation, for which he has not paid, and received large sums of money which he has not refunded. The complaint sets forth a list of more than 200 items, aggregating total debits of \$73,029.07, during the period in which he was connected with the corporation, and total credits of \$27,434, indicating a balance due the corporation of \$45,595.07.

It is further alleged that December 31, 1936, at the company's office in Chicago, plaintiff and defendant accounted together concerning the sums of money before that time owing from defendant to plaintiff, and upon such account it was found defendant was indebted to plaintiff in the sum of \$45,595.07, with interest thereon at 6 per cent per annum, which defendant promised to pay when requested; that payment thereof was demanded of defendant by plaintiff on the aforementioned date, and every month previous to the commencement of the enumerated statement of account, but defendant refused and still refuses to pay the same.

Defendant's answer admits his connection with the corporation during the period alleged as stockholder, officer and director, but categorically denies substantially all the other material allegations of the complaint; and as a further defense he avers that as to the \$72,171.29, part of the cause of action, the same did not accrue to plaintiff at any time within five years next before the commencement of the action, and that the suit is therefore barred by the Statute of Limitations.

By way of amended counterclaim defendant alleged that he and his brother Roy are and have been since 1918 the sole and only stockholders of the corporation, with the exception of a qualifying share issued to LeRoy Wimp, a son of Roy Wimp, and that said stockholdings are as follows: Roy Wimp, 1318

amount of goods from the corporation, for which he has not paid, and received large sums of money which he has not repaid. The complaint sets forth a list of more than 200 items, aggregating total debts of \$73,019.07, during the period in which he was connected with the corporation, and total credits of \$27,434, leaving a balance due the corporation of \$45,585.07.

It is further alleged that December 31, 1936, at the company's office in Chicago, plaintiff and defendant accounted together concerning the sums of money before that time owing from defendant to plaintiff, and upon such account it was found defendant was indebted to plaintiff in the sum of \$45,585.07, with interest thereon at a per cent per annum, which defendant promised to pay when requested; that payment thereof was demanded of defendant by plaintiff on the aforementioned date, and every month previous to the commencement of the enumerated statement of account, but defendant refused and still refuses to pay the same.

Defendant's answer admits his connection with the corporation during the period alleged as stockholder, officer and director, but categorically denies substantially all the other material allegations of the complaint; and as a further defense he avers that as to the \$73,019.07, part of the sums of money the same did not come to plaintiff at any time within five years next before the commencement of the action, and that the suit is therefore barred by the statute of limitations.

By way of amended complaint defendant alleges that he and his brother Roy are the sole owners since 1918 the sole and only stockholders of the corporation, which the corporation of a qualifying stock issued to Roy and Roy's son of Roy and that said stockholdings are as follows: Roy and Roy's

shares; Elgy Wimp, 681 shares; LeRoy Wimp, 1 share, or an aggregate of 2,000 shares, which constitute all the issued and outstanding stock of the corporation; that defendant and his brother Roy, at the time of their subscriptions to the capital stock of the company, gave in partial payment thereof their respective notes secured by capital stock as collateral; that defendant, from the date of the organization of the company, has been its vice president and treasurer and a member of the board of directors; that Roy Wimp has been president and director, and his son LeRoy, secretary and a director; that from time to time defendant made meat purchases from the corporation which were charged to his open account, similar purchases also being made by Roy and LeRoy, which were charged to their respective accounts; that all these purchases were the result of a mutual custom and understanding, "and it was never intended that any interest charges were to be made by the corporation upon said open accounts;" that certain insurance policies were taken out on the lives of defendant and Roy for the benefit of the corporation some time after its organization; that the policy on the life of defendant (Equitable Life Assurance Society policy No. 3960337) was payable to his estate as beneficiary, but was pledged as collateral to a loan of the corporation with the Depositors State Bank, and it was always intended that the corporation was to be the beneficiary of this policy; that the Depositors State Bank passed into receivership and for convenience no change was made in the beneficiary until about October, 1936, when the corporation paid off its loan to the bank and the policy was released, and thereupon the corporation was promptly made the beneficiary thereunder.

It is further alleged that in September, 1926, Roy willfully and maliciously entered upon a course of conduct designed

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policy was released, and thereupon the corporation was promptly
when the corporation paid off its loan to the bank and the
change was made in the beneficiary until about October, 1936,
State Bank passed into receivership and for convenience no
was to be the beneficiary of this policy; that the Depositors
State Bank, and it was always intended that the corporation
collateral to a loan of the corporation with the Depositors
payable to his estate as beneficiary, but was pledged as
(Equitable Life Assurance Society policy No. 1362337) was
organization; that the policy on the life of defendant
Roy for the benefit of the corporation some time after its
insurance policies were taken out on the lives of defendant and
by the corporation upon said open accounts; "that certain in-
was never intended that any interest charges were to be made
were the result of a mutual custom and understanding, and it
charged to their respective accounts; that all these purchases
similar purchases also being made by Roy and DeKey, which were
from the corporation which were charged to his open account,
director; that from time to time defendant made said purchases
president and director, and his son DeKey, secretary and a
member of the board of directors; that Roy had been
company, has been its vice president and treasurer and a
that defendant, from the date of the organization of the
their respective notes secured by capital stock as collateral;
capital stock of the company, gave in partial payment thereof
his brother Roy, at the time of their subscription to the
and outstanding stock of the corporation; that defendant and
aggregate of 2,000 shares, which constitutes all the issued
shares; fifty shares; DeKey thirty, one share, on an

to unlawfully and wrongfully deprive defendant of his stock in the corporation and to unlawfully exploit it and convert its funds and assets for his own benefit; and in pursuance of the plan and scheme Roy has since that time continuously, arbitrarily and unlawfully manipulated the affairs, moneys and properties of the corporation for his own use and benefit, to the injury of defendant and to the end that defendant might be deceived as to the actual condition of the business and his rights to stock in the corporation; that Roy has maliciously caused certain unlawful and wrongful interest charges to be placed against defendant's open account over a number of years and without his knowledge; to this allegation there is appended a list of 13 items, beginning with September 30, 1926, to December 31, 1936, aggregating \$17,532.47, which are alleged to be charges made contrary to the custom and understanding between the parties and never provided for at any valid meeting of the stockholders or directors.

It is further alleged that Roy maliciously caused certain unlawful and wrongful charges to be placed against defendant's open account, without his knowledge, for life insurance premiums paid over a number of years in the sum of \$12,043.62 on the aforesaid insurance policy, which were properly chargeable to the corporation; that he likewise maliciously caused certain unlawful and wrongful charges to be placed against defendant's open account over a number of years, without defendant's knowledge, consisting of many miscellaneous items, and in particular one item dated April 2, 1919, in the amount of \$10,000, which were erroneous and have no basis in fact; that Roy maliciously caused certain unlawful and wrongful credits to be placed upon Roy's open account over a number of years, without defendant's knowledge, covering, among other things, interest credits on a loan from Roy to the corporation, aggregating \$7,195.09, which was never authorized at any valid meeting of the stockholders or directors;

to unlawfully and wrongfully derive advantage of his stock in the corporation and to unlawfully withhold it from the stockholders and assets for his own benefit; and in consequence of the plan and scheme of the defendant, the corporation, unlawfully and wrongfully maintained the affairs, books and records of the corporation for his own use and benefit, to the injury of the defendant and to the end that defendant might be deceived as to the actual condition of the business and his rights to share in the corporation; that he has maliciously caused certain unlawful and wrongful interest charges to be placed against defendant's open account over a number of years and without his knowledge; to wit: allegation there is appended a list of 12 items, beginning with September 30, 1926, to December 31, 1930, aggregating \$17,332.47, which are alleged to be charges made contrary to the usual and understanding between the parties and never provided for at any valid meeting of the stockholders or directors.

It is further alleged that he maliciously caused certain unlawful and wrongful charges to be placed against defendant's open account, without his knowledge, for life insurance premiums paid over a number of years in the sum of \$12,000.00 on the basis of said insurance policy, which were properly chargeable to the corporation; that he maliciously caused certain unlawful and wrongful charges to be placed against defendant's open account over a number of years, without defendant's knowledge, consisting of many miscellaneous items, and in particular one item dated April 2, 1919, in the amount of \$10,000, which was wrongfully and have no basis in fact; that he maliciously caused certain unlawful and wrongful credits to be placed upon defendant's open account over a number of years, without defendant's knowledge, covering, among other things, interest credits on a loan from defendant to the corporation, aggregating \$7,181.02, which was never authorized at any valid meeting of the stockholders or directors;

that Roy maliciously caused certain unlawful and wrongful credits to be placed upon Roy's notes receivable account, thereby reducing his indebtedness to the corporation on three items, respectively, of \$30,307.89, \$23,728.06 and \$6,579.83; that the entry of these items was unlawful, wrongful and erroneous in that the total debit to common stock unissued should have been prorated between Roy and Elgy in proportion to their stockholdings, and on that basis the notes receivable account of Roy should have been \$19,972.90 and the credit to the notes receivable account of Elgy should have been \$10,319.84; and it is alleged that thereby the notes receivable account of Roy was overcredited in the sum of \$3,755.16, and the notes receivable account of Elgy was undercredited in the sum of \$3,740.01.

The amended counterclaim contained various other allegations of a similar nature, alleging wrongful acts on the part of Roy to the prejudice of defendant's rights and interests in the corporation; and he therefore asked for an accounting, judgment, the appointment of a receiver and the dissolution of the corporation. The answer to the counterclaim, in the main, categorically denied the numerous allegations of the counterclaim and asked the dismissal thereof.

The hearings before the master to whom the cause had been referred continued for approximately four months, and when he filed his report, counsel for the respective parties were evidently of opinion that the master had misconceived the issues and asked him to file another report, which is substantially the same as the first. To this report plaintiff and counterdefendant filed objections and exceptions charging that the findings of the master in both reports were in direct conflict with the evidence and erroneous as to the legal conclusions drawn from the evidence; that the master had failed to comprehend the points in issue; that he was absent from several of the hear-

that Roy maliciously caused certain unlawful and wrongful credits to be placed upon Roy's notes receivable account, thereby robbing his indebtedness to the corporation on these items, respectively, of \$30,707.94, \$23,725.00 and \$6,722.83; that the entry of these items was unlawful, wrongful and erroneous in that the total debit to common stock would have been provided between Roy and Ely in proportion to their stockholdings, and on that date the notes receivable account of Roy should have been \$19,972.90 and the credit to the notes receivable account of Ely should have been \$10,319.64; and it is alleged that thereby the notes receivable account of Roy was overcredited in the sum of \$2,775.10, and the notes receivable account of Ely was undercredited in the sum of \$3,748.01. The amended counterclaim contained various other allegations of a similar nature, alleging wrongful acts on the part of Roy to the prejudice of defendant's rights and interests in the corporation; and he therefore asked for an accounting, judgment, the appointment of a receiver and the dissolution of the corporation. The answer to the counterclaim, in the main, categorically denied the numerous allegations of the counterclaim and asked the dismissal thereof.

The hearings before the master to whom the cause had been referred continued for approximately four months, and when he filed his report, counsel for the respective parties were evidently of opinion that the master had misconceived the issues and asked him to file another report, which he substantially the same as the first. To this report plaintiff and counter-defendant filed objections and exceptions charging that the findings of the master in both reports were in direct conflict with the evidence and erroneous as to the legal conclusions drawn from the evidence; that the master had failed to comprehend the points in issue; that he was bound from several of the hear-

ings, late at others, and inattentive; and "that because of the similarity of the legal verbiage of the counterclaim and the Master's second report, it is a difficult task to convince the ordinary mind that the Master arrived at his conclusions from his own impartial investigations of the evidence and the law;" that it was necessary and hearings were had without the master being present; and that the entire second report was inconsistent with the evidence. Defendant and counterclaimant Elgy Wimp likewise filed objections to the report, in which he charged that it was incomplete and defective in its entirety; that all the findings of the master were imperfect, restricted and not sufficiently comprehensive to properly inform the court on the matters of fact and law involved therein, and that the report ought to be varied, altered and completely revised. These objections and exceptions were called to the attention of the chancellor and were later brought to our attention on oral argument. By reason of the objections and exceptions, the chancellor was evidently prompted to make an independent study of the entire record, and after considering the pleadings and evidence, totally disapproved of the master's conclusions and entered the decree from which this appeal is prosecuted.

With respect to the account stated, the master found from the evidence submitted that plaintiff had failed to prove an account stated against Elgy Wimp in any sum whatsoever, and that no such account exists. He concluded that the evidence disclosed a credit balance on the notes receivable account of Elgy Wimp amounting to \$3,923.82 which is properly applicable against the debit balance of \$3,882.58 on his open account, leaving a net credit of \$41.24 in favor of defendant, and recommended "that a permanent and liquidating receiver be appointed *** for the plaintiff corporation, *** with full power to liquidate the assets and business of said plaintiff

ing, late at evening, and in the morning; and "that because of the similarity of the legal verbiage of the two reports, and the fact that the second report, it is a difficult task to determine the ordinary and that the report arrives at the same conclusion as his own impartial investigations of the evidence and the law; that it was necessary for the court to have the report being presented; and that the entire second report was inconsistent with the evidence. Defendant and counsel claim that it was wise to file objections to the report, in which he charged that it was incomplete and defective in its entirety; that all the findings of the master were imperfect, restricted and not sufficiently comprehensive to properly inform the court on the matters of fact and law involved therein, and that the report ought to be revised, altered and completely rewritten. These objections and exceptions were filed to the attention of the Chancellor and were later brought to our attention on oral argument. By reason of the objections and exceptions, the Chancellor was evidently prompted to make an independent study of the entire record, and after considering the pleadings and evidence, totally disapproved of the master's conclusions and entered the report from which this appeal is prosecuted.

With respect to the account stated, the master found from the evidence submitted that Plaintiff had failed to prove an account stated against Defendant in any way whatsoever, and that no such account exists. He concluded that the evidence disclosed a credit balance on the notes receivable account of Defendant amounting to \$1,923.42 which is properly applicable against the debit balance of \$3,846.84 on the same account, leaving a net credit of \$1,923.42 in favor of Defendant, and recommended that a judgment and satisfaction be entered accordingly for the Plaintiff corporation, with full power to liquidate the assets and business of said Plaintiff.

corporation, and that upon the completion of said liquidation, that said plaintiff corporation be dissolved by order of this Court."

Several years before the complaint was filed, Elgy Wimp had voluntarily severed his connection with all activities of the plaintiff corporation and had organized and started an independent packing business of his own in Streator, Illinois. During all this time plaintiff was and is still a going concern and there was no justification whatever, in law or in fact, for recommending a liquidating receiver and dissolving the company, by reason of the controversy which arose between two of its stockholders as to their respective accounts. The statute makes no provision for such drastic action and the master cites no authority for his recommendation. Therefore, the court properly rejected this recommendation of the master.

The pleadings and evidence with respect to the account stated may be briefly summarized as follows: October 18, 1938, plaintiff filed an amendment to its complaint, alleging that on June 7, 1937, it accounted together with defendant as to money before that time owing from defendant to plaintiff, and that it was then found that defendant was indebted to plaintiff in the sum of \$33,551.45, and for the further sum of \$12,043.62 for moneys advanced for defendant on his insurance premiums and interest. The evidence discloses that June 7, 1937, plaintiff mailed to defendant at Streator, Illinois, where he was then engaged in the packing business a letter with enclosure of plaintiff's exhibit 2 of May 4, 1938, showing a complete statement of Elgy Wimp's account. This letter and account were mailed in an envelope containing thereon the name and address of plaintiff's attorney for return; and it was shown that the letter so mailed was not returned undelivered by the post office department. In

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corporation, and that upon the completion of said liquidation, that said plaintiff corporation be dissolved by order of this Court."

Several years before the complaint was filed, Ray and had voluntarily severed his connection with all activities of the plaintiff corporation and had organized and started an independent packing business of his own in Stretton, Illinois. During all this time plaintiff was and is still a going concern and there was no justification whatever, in law or in fact, for recommending a liquidating receiver and dissolving the company, by reason of the controversy which arose between two of its stockholders as to their respective accounts. The statute makes no provision for such drastic action and the master sides no authority for his recommendation. Therefore, the court properly rejected this recommendation of the master.

The pleadings and evidence with respect to the account stated may be briefly summarized as follows: October 12, 1936, plaintiff filed an amendment to its complaint, alleging that on June 7, 1937, it accounted together with defendant as to money before that time owing from defendant to plaintiff, and that it was then found that defendant was indebted to plaintiff in the sum of \$33,751.45, and for the further sum of \$12,045.62 for moneys advanced for defendant on his insurance premiums and interest. The evidence discloses that June 7, 1937, plaintiff mailed to defendant at Stretton, Illinois, where he was then engaged in the packing business a letter with enclosure of plaintiff's exhibit 2 of May 4, 1936, showing a complete statement of Ray's account. This letter and account were mailed in an envelope containing thereon the name and address of plaintiff's attorney for return; and it was shown that the letter so mailed was not returned undelivered by the post office department. In

Dick v. Zimmerman, 207 Ill. 636, the court, under similar circumstances, held that such a letter, properly addressed and mailed, raises the presumption that it reached the addressee. The statement enclosed in the letter contained an itemized list of the yearly totals of debits and credits in the account of Elgy Wimp for the years 1917 to 1936, both inclusive, and represented the yearly totals for those years of all the items in plaintiff's complaint, except the insurance premiums for the years 1926 to 1937, both inclusive. Defendant denied having received or seen this exhibit. Steve Tandaric, plaintiff's bookkeeper, testified that between June 15 and 19, 1936, he made up a statement of defendant's account and showed it to him in plaintiff's office. Another witness, Fred DeJaeger, testified that he was employed by the corporation from July, 1934, to April, 1935, as bookkeeper; that he drew off monthly or annual statements and showed them to defendant; that he explained accounts payable of defendant, especially on account of the interest computed every year. Roy Wimp, president of the corporation, testified that after Elgy had begun to run behind in his account, he "would show him a statement and demand what was on the statement at that time," and it was his recollection that the last time he showed Elgy such a statement was August 1, 1936. He then asked him to pay it, and Elgy promised to do so as soon as he could.

Defendant denied generally that an account stated had been had with plaintiff. He denied receiving the latter of June 7, 1937, with an itemized account enclosed, mailed to him at Streator, Illinois. When a statement showing his account was exhibited at the hearing, he denied having ever seen it.

He admitted knowing DeJaeger, formerly bookkeeper of plaintiff corporation, but denied that he had ever received from him any statement of the condition of the company or any account, or that Jaeger had ever spoken to him about the mounting interest

Dick v. N.Y. Corp., 207 Ill. 636, the court, under similar circumstances, held that such a letter, properly addressed and mailed, raises the presumption that it reached the addressee. The statement enclosed in the letter contained an itemized list of the yearly totals of debits and credits in the account of N.Y. Corp. for the years 1917 to 1936, both inclusive, and represented the yearly totals for those years of all the items in plaintiff's complaint, except the insurance premiums for the years 1926 to 1937, both inclusive. Defendant denied having received or seen this exhibit. Steve Tondric, plaintiff's bookkeeper, testified that between June 15 and 19, 1936, he made up a statement of defendant's account and showed it to him in plaintiff's office. Another witness, Fred Delaney, testified that he was employed by the corporation from July, 1934, to April, 1935, as bookkeeper; that he drew off monthly or annual statements and showed them to defendant; that he explained accounts payable of defendant, especially an account of the interest computed every year. Roy Lipp, president of the corporation, testified that after May had begun to run behind in his account, he "would show him a statement and demand that was on the statement at that time," and it was his recollection that the last time he showed N.Y. such a statement was August 1, 1936. He then asked him to pay it, and N.Y. promised to do so as soon as he could. Defendant denied generally that an account stated had been had with plaintiff. He denied receiving the letter of June 7, 1937, with an itemized account enclosed, mailed to him at Streator, Illinois. When a statement showing his account was exhibited at the hearing, he denied having ever seen it. He admitted knowing Delaney, formerly bookkeeper of plaintiff corporation, but denied that he had ever received from him any statement of the condition of the company or any account, or that Delaney had ever spoken to him about the mounting interest

charges. Defendant likewise denied the testimony of other witnesses offered on behalf of plaintiff with reference to the account stated, and took the position that no accounts had ever been rendered to him.

The evidence shows that plaintiff had paid an aggregate of \$12,043.62 as insurance premiums on a policy issued to defendant during the years in question. The Equitable Life Assurance Society of the United States had issued a policy No. 3960337 in the amount of \$15,000 on the life of Elgy Wimp, payable to his executors, administrators or assigns. The premiums were undoubtedly advanced by plaintiff, and plaintiff was entitled to be reimbursed therefor. As against the documentary evidence and the testimony of at least two witnesses other than Roy Wimp, president of the corporation, all indicating that Elgy Wimp's account had been the subject matter of discussion over a period of years, that a statement of his account was presented to him on various occasions and finally mailed to him at Streator, we have the denial by Elgy that an account was ever presented to him or that he received the letter containing an itemized statement of the account at Streator. Plaintiff's witnesses testified that Elgy Wimp had promised to pay the amount which he allegedly owed as soon as he was able to do so. This testimony he also denied. It is difficult to reconcile Elgy's testimony with the evidence adduced by plaintiff. Under ordinary circumstances a master's findings, although not conclusive, are entitled to due weight in consequence of the opportunities afforded him for determining the credibility of witnesses, but in this case both counsel complained of the absence and inattention of the master at hearings, of the inconsistency between the evidence and his findings, which Elgy Wimp in his objections characterized as "imperfect, restricted, and not sufficiently comprehensive to properly inform the court on the matters

charges. Defendant likewise denied the testimony of other witnesses offered on behalf of plaintiff with reference to the account stated, and took the position that no account had ever been rendered to him.

The evidence shows that plaintiff had paid an aggregate of \$12,043.62 as insurance premiums on a policy issued to defendant during the years in question. The Equitable Life Assurance Society of the United States had issued a policy No. 3960337 in the amount of \$12,000 on the life of Elzy Kemp, payable to his executors, administrators or assigns. The premiums were undoubtedly advanced by plaintiff, and plaintiff was entitled to be reimbursed therefor. As against the documentary evidence and the testimony of at least two witnesses other than Roy Kemp, president of the corporation, all indicating that

Elzy Kemp's account had been the subject matter of discussion over a period of years, that a statement of his account was presented to him on various occasions, and finally mailed to him at Streator, we have the denial by Kemp that an account was ever presented to him or that he received the letter containing an itemized statement of the account at Streator. Plaintiff's witnesses testified that Elzy Kemp had promised to pay the amount which he allegedly owed as soon as he was able to do so. This testimony he also denied. It is difficult to reconcile Elzy's testimony with the evidence advanced by plaintiff. Under

ordinary circumstances a master's findings, although not conclusive, are entitled to due weight in consequence of the opportunities afforded him for determining the credibility of witnesses, but in this case both counsel complained of the absence and intervention of the master at hearings, of the inconsistency between the evidence and his findings, which Elzy Kemp in his objections characterized as "imperfect, unrelated, and not sufficiently comprehensive to properly inform the court on the matters

of fact and law involved therein," and which are also severely criticised by plaintiff. Because of these circumstances, the chancellor was obliged to examine the record independently and we have deemed it necessary to do likewise. From such examination we think the chancellor properly disapproved of the master's findings and found in favor of plaintiff on the account stated.

It is, of course, a fundamental rule that Elgy Wimp had the burden of establishing his counterclaim by a preponderance of the evidence. A considerable portion of his testimony as to notice and knowledge of the plaintiff's books and account was contradicted by several witnesses. The record does not sustain his contentions as to the counterclaim. Certainly there was no ground for the recommendation that a liquidating receiver be appointed and the corporation dissolved, since it was a going concern, and there was no justification from the evidence in finding that its assets should be taken from the control of its officers who had managed the business for many years, notwithstanding the controversy between two of the stockholders as to their individual accounts.

Defendant's counsel advances various legal propositions with respect to the account stated. It is urged that, in order to constitute an account stated, there must be, in every case, proof in some form of assent to the account, and an acknowledgment of the indebtedness of a certain sum. We think plaintiff made a satisfactory showing in this respect. If the testimony of plaintiff's witnesses is to be believed, Elgy Wimp received statements of his account from time to time, showing the items which he now disputes. There is evidence that he promised to pay the account. He now takes the position that he never received these statements, but if the conclusion is justified that statements were presented to him periodically and ultimately mailed to him at

of fact and law involved therein," and which was also severely criticized by plaintiff. Because of these circumstances, the Chancellor was obliged to examine the record independently and we have deemed it necessary to do likewise. From such examination we think the Chancellor properly disapproved of the master's findings and found in favor of plaintiff on the issues stated.

It is, of course, a fundamental rule that the party has the burden of establishing his case by a preponderance of the evidence. A considerable portion of the testimony as to notice and knowledge of the plaintiff's books and accounts was contradicted by several witnesses. The record does not sustain his contentions as to the counterclaim. Certainly there was no ground for the recommendation that a liquidating receiver be appointed and the corporation dissolved, since it was a going concern, and there was no justification for the evidence in finding that its assets should be taken from the control of its officers who had managed the business for many years, notwithstanding the controversy between two of the stockholders as to their individual accounts.

Defendant's counsel advances various legal propositions with respect to the account stated. It is urged that, in order to constitute an account stated, there must be, in every case, proof in some form of assent by the debtor, and an acknowledgment of the indebtedness of a certain sum. We think plaintiff made a satisfactory showing in this respect. If the testimony of plaintiff's witness is to be believed, they also received statements of his account from the time, showing the items which he now disputes. There is evidence that he promised to pay the account. He now takes the position that he never received these statements, but if the contention is justified that statements were presented to the petitioner and allegedly failed to make

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Streator, without any dissent on his part, assent would be implied. It is also urged that an account stated is only prima facie evidence of its correctness, and may be impeached for fraud, mistake, omission or inaccuracy. Defendant cannot take the position that he was never presented with an account and, at the same time, contend that the account was inaccurate. An examination of the record leads us to the conclusion that defendant never seriously questioned or challenged the account, but allowed it to run along through these many years, assenting thereto, and that he promised to pay it on several occasions but failed so to do.

We are accordingly of opinion that the judgment order and decree of the chancellor should be affirmed, and it is so ordered.

JUDGMENT ORDER AND DECREE AFFIRMED.

Scanlan, P. J., and Sullivan, J., concur.

Stewart, without any dissent on his part, account would be implied. It is also urged that an account stated is only prima facie evidence of its correctness, and may be impeached for fraud, mistake, omission or inaccuracy. Defendant cannot take the position that he was never presented with an account, and, at the same time, contend that the account was incorrect. An examination of the record leads us to the conclusion that defendant never seriously questioned or challenged the account, but allowed it to run along through these many years, accepting thereof, and that he promised to pay it on several occasions but failed so to do.

We are accordingly of opinion that the judgment entered and decree of the chancellor should be affirmed, and it is so ordered.

JUDGMENT GRANT AND DECREE AFFIRMED.

Scamman, J., J., and Sullivan, J., concur.

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LIBERTY NATIONAL BANK OF CHICAGO,
as trustee under the provisions
of a trust agreement dated the
11th day of April, 1940, and known
as Trust No. 2961,

Appellee,

v.

MONTGOMERY J. ATKINSON,

Appellant.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

313 I.A. 263

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

March 12, 1940, 743 Brompton Ave. Apts., Inc., made a lease with the defendant, Montgomery J. Atkinson, for an apartment to be used as a private residence or dwelling on premises known as 755 Brompton avenue, Chicago, for the term commencing May 1, 1940, and expiring April 30, 1941, at a stipulated rental of \$50 a month. Defendant never entered into possession of the apartment for reasons hereinafter set forth. In September, 1940, plaintiff, as assignee of the original lessor, by statement of claim and cognovit filed in the Municipal court, had judgment against defendant for \$237.50 and costs, being rent for the months of June to September, 1940, inclusive, interest and attorneys' fees. After issuance of execution, defendant duly appeared and, by written motion supported by his affidavit and that of his wife, Beatrice E. Atkinson, moved the court to open the judgment by confession, to stay execution thereof, and to allow defendant a trial by jury. The motion was denied, and thereafter the further motion of defendant to vacate or set aside the order overruling his prior motion, was likewise denied. This appeal is prosecuted to reverse the court's ruling on these motions.

The sole question presented is whether the affidavits of defendant and his wife, in support of defendant's motion to open the judgment by confession, disclosed a prima facie defense on the

LIBERTY NATIONAL BANK OF CHICAGO,
as trustee under the provisions
of a trust agreement dated the
fifth day of April, 1940, and known
as Trust No. 2961,
Appellee,

ATLANTIC TRUST COMPANY
CORPORATION OF CHICAGO,

v.

MONTGOMERY J. ATKINSON,
Appellant.

31514-568

MR. JUSTICE FRANK DELIVERED THE OPINION OF THE COURT.

March 12, 1940, 743 Brompton Ave. Apts., Inc., made a
lease with the defendant, Montgomery J. Atkinson, for an apart-
ment to be used as a private residence or dwelling on premises
known as 755 Brompton Avenue, Chicago, for the term commencing
May 1, 1940, and expiring April 30, 1941, at a scheduled rental
of \$50 a month. Defendant never entered into possession of the
apartment for reasons hereinafter set forth. In September,
1940, plaintiff, as assignee of the original lessor, by mes-
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the months of June to September, 1940, inclusive, interest and
attorneys' fees. After issuance of execution, defendant duly
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that of his wife, Beatrice E. Atkinson, moved the court to open
the judgment by confession, to stay execution thereof, and to
allow defendant a trial by jury. The motion was denied, and
thereafter the further motion of defendant to vacate or set aside
the order overruling his prior motion, was likewise denied. This
appeal is prosecuted to reverse the court's ruling on these motions.
The sole question presented is whether the affidavits of
defendant and his wife, in support of defendant's motion to open
the judgment by confession, disclosed a prima facie defense on the

merits to the whole or a part of plaintiff's demand. This requires a consideration of the pleadings presented. The material portions of defendant's affidavit may be summarized as follows: He alleged that March 1, 1940, through his wife, acting as his agent, he entered into negotiations with the original lessor corporation, for the leasing of the apartment in question, through one Mrs. Landmann, who is also the wife of the janitor of the building, acting as agent for lessor; that before inspecting the apartment Mrs. Atkinson made extensive inquiries of the agent with respect to the health of the then tenants occupying the apartment during their tenancy, and when informed by the agent that the then tenants had lived there for only one year, Mrs. Atkinson also made extensive inquiries of the agent with respect to the health of the tenants who occupied the apartment immediately prior to the then tenants, and informed the agent that she would not be interested in the renting of the apartment if any one had been sick or had died there during its occupancy; that in answer to these inquiries the agent Mrs. Landmann, "for the purpose of inducing affiant to lease said apartment, falsely informed and represented to affiant's wife that there had been no sickness or death in said apartment during the occupancy of the same by the then tenants thereof, or during the occupancy of the same by the tenants occupying said apartment prior to the then tenants thereof;" that Mrs. Atkinson, on the faith of the agent's statements, "and relying implicitly upon the same, and believing the same to be true," caused defendant to pay a ten-dollar deposit for the rental of the apartment, and thereafter to execute the lease in question; that April 24, 1940, when defendant was about to enter into possession of the apartment, he was informed by Mrs. Landmann that the tenants therein desired to remain on the premises until May 9, and he was requested by her to delay occupying the apartment until that date; that upon receiving

writes to the whole or a part of plaintiff's demand. This re-
quires a consideration of the plaintiff's demand. The material
portions of defendant's affidavit may be summarized as follows:
He alleged that March 1, 1940, through his wife, acting as his
agent, he entered into negotiations with the original lessor
corporation, for the leasing of the apartment in question,
through one Mrs. Landmann, who is also the wife of the lessor
of the building, acting as agent for lessor; that before negotiating
the apartment Mrs. Landmann made extensive inquiries of the agent
with respect to the health of the then tenants occupying the apart-
ment during their tenancy, and when informed by the agent that the
then tenants had lived there for only one year, Mrs. Landmann also
made extensive inquiries of the agent with respect to the health
of the tenants who occupied the apartment immediately prior to the
then tenants, and informed the agent that she would not be interested
in the renting of the apartment if any one had been sick or had died
there during its occupancy; that in answer to these inquiries the
agent Mrs. Landmann, "for the purpose of inducing plaintiff to lease
said apartment, falsely informed and represented to plaintiff's wife
that there had been no sickness or death in said apartment during
the occupancy of the same by the then tenants thereof, or during
the occupancy of the same by the tenants occupying said apartment
prior to the then tenants thereof;" that Mrs. Landmann, on the
faith of the agent's statements, "and relying implicitly upon the
same, and believing the same to be true," caused defendant to pay
a ten-dollar deposit for the rental of the apartment, and there-
after to execute the lease in question; that April 24, 1940, when
defendant was about to move into possession of the apartment, he
was informed by Mrs. Landmann that the tenants therein residing
remained on the premises until May 5, and he was requested by her to
delay occupying the apartment until that date; that upon receiving

this request, defendant asked Mrs. Landmann whether the delay of the tenants in vacating was caused by sickness in the family, and Mrs. Landmann replied in the negative; that defendant then and there informed her that it would be necessary for him to move in May 1 and April 25, the day following his conversation with Mrs. Landmann, he informed lessor, by letter of that date, that it would be necessary for him to have possession May 1; that in preparation for forcible entry and detainer proceedings against the tenant, he telephoned the occupant of the apartment, who told him that he was unable to yield possession because the apartment had been quarantined by the board of health on account of scarlet fever, which his son had contracted, and the occupant at the same time informed defendant that the apartment had twice before been quarantined during his occupancy for contagious diseases, and it is alleged that this information first came to him May 1, 1940, in the course of his conversation with the then occupant of the premises; that defendant immediately thereafter verified the fact with respect to these three quarantines by inspection of the records at the Chicago Board of Health, and from the records ascertained that the representations of Mrs. Landmann that there had been no sickness in the apartment during the occupancy of the then tenant were false and fraudulent; that upon learning these facts, defendant immediately notified counsel for lessor that the lease which defendant had executed was null and void and that he would not occupy the leased apartment and thereafter, in a conference with counsel for the lessor, at which the president of lessor corporation was present, he repeated what he had previously written. Subsequently defendant demanded return of his deposit and one month's rent, which he had paid after executing the lease, but his request was never complied with.

Beatrice E. Atkinson's affidavit alleged that she is defendant's wife; that she had read the affidavit of defense

defendant's wife; that she had been the victim of a fraud
 Detective E. A. Sullivan's affidavit alleged that she is
 his request was never complied with.
 month's rent, which he said after vacating the lease, but
 subsequently defendant demanded return of his deposit and one
 action was brought, in respect where he had previously written
 counsel for the lessor, at which the president of Lessor Corpora-
 occupy the leased apartment and furniture, in a conference with
 defendant had executed the bill and told him that he would not
 immediately notified counsel for lessor that the lease which
 false and fraudulent; that upon learning these facts, defendant
 ness in the apartment during the occupancy of the then tenant, were
 the representations of Mrs. Landmann that there had been no sick-
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 to these facts defendant by inspection of the records and
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 with Mrs. Landmann, he informed lessor, by letter of that date,
 move in May 1 and April 25, the day following his conversation
 and there informed her that it would be necessary for him to
 and Mrs. Landmann replied in the negative; that defendant then
 of the tenants in vacating was caused by sickness in the family,
 this request, defendant asked Mrs. Landmann whether she desired

prepared by her husband, knew the contents thereof, and knew of her own personal knowledge that all the allegations therein contained with respect to acts or things done by her, acting as agent for her husband, were true, in substance and in fact.

Plaintiff's counsel argue that the affidavits were defective principally for the threefold reason that (1) they do not conform to the requirements specified by rules 76 (2) and 73 (1) of the Civil Practice Rules of the Municipal Court of Chicago, effective July 1, 1940; (2) defendant did not allege the essential element of scienter in his motion and supporting affidavits and thus failed to disclose the prima facie defense required by Rule 76 (2); and (3) the representations were not material.

With respect to the first two contentions it is argued that defendant's affidavit was defective because the affiant, if sworn as a witness, could not testify competently to the matters alleged therein, since, under the rules, affidavits in support of a motion are required to be made on the personal knowledge of the affiants. However, counsel overlooks that portion of rule 73 (1), which provides that "If all the facts to be shown are not within the personal knowledge of one person, two or more affidavits shall be used." We think the two affidavits, taken together, fully satisfy the requirements of the rule.

Various contentions are made with respect to the necessity for alleging the essential elements of scienter, and considerable space is devoted in both briefs to that subject. However, we find in par. 3 of defendant's affidavit the allegations of answers which Mrs. Landmann gave concerning the health of the tenants occupying the apartment immediately prior to the then tenants thereof and we regard these as sufficient. In addition thereto it is alleged "That in answer to said inquiries said agent, for the purpose of inducing affiant to lease said apart-

prepared by her husband, that the contents of the same are her own personal knowledge that all the allegations therein contained with respect to acts or things done by her, acting as agent for her husband, were true, in substance and in fact.

Plaintiff's counsel argues that the affidavits were

defective principally for the following reason that (1) they do not conform to the requirements specified by rules 70 (2) and (3) of the Civil Practice Rules of the Municipal Court of Chicago, effective July 1, 1940; (2) defendant did not allege the essential element of act or omission in his motion and supporting affidavits and thus failed to disclose the precise facts because required by rule 70 (2); and (3) the representations were not material.

With respect to the first two contentions it is argued that defendant's affidavit was defective because the affidavit is sworn as a witness, could not lawfully be competent to the matters alleged therein, since, under the rules, affidavits in support of a motion are required to be made on the personal knowledge of the affiant. However, counsel overlooks that portion of rule 70 (1) which provides that "if all the facts to be shown are not within the personal knowledge of one person, two or more affidavits may be used." We think the two affidavits, taken together, fully satisfy the requirements of the rule.

Various contentions are made with respect to the necessity for alleging the essential elements of act or omission, and considerable space is devoted in both briefs to that subject. However, we find in par. 7 of defendant's affidavit the allegations of answers which Mrs. Henderson gave concerning the health of the tenants occupying the apartment immediately prior to the then tenants' tenancy and we regard these as sufficient. In addition thereto it is alleged "that in answer to said inquiries said agent, for the purpose of inducing plaintiff to lease said apart-

ment, falsely informed and represented, etc." It was held in Farwell et al. v. Metcalfe, 61 Ill. 372, that "Where false statements are made, with intent to deceive and defraud, the necessary implication is, that the person making such false statements, with such intent, has a knowledge of their falsity. Otherwise the false character of the representations, and the intent to deceive, could not coexist."

With respect to the materiality of the representations, we think the case of Fuller v. DePaul University, 293 Ill. App. 261, is expressive of the general rule. In that case suit was brought against a Catholic university by a teacher for alleged breach of an oral contract of employment. The undisputed evidence disclosed that plaintiff had made intentional concealments of the fact that he had been a Catholic priest, had subsequently left the priesthood, marrying and becoming the father of two children, and was at the time of the suit what is termed a "fugitive". The court held that these concealments amounted to material and fraudulent misrepresentations, and that his silence as to these things was a deception which induced defendant to employ him. Quoting from 13 C. J. 390, sec. 294, the court adopted the general rule that matters are always material which, if they had been known to be false, would not have resulted in the contract entered into. The affidavits presented by defendant and his wife allege that they made special inquiry with reference to the health of tenants who had occupied the apartment before the lease was executed, and it is definitely alleged that Mrs. Atkinson advised the agent of the lessor that she would not be interested in leasing the apartment if there had been any sickness or death on the premises prior thereto. The trial court evidently overruled defendant's motion to open the judgment on the ground that the

cont, false information and representation, etc. It was held in Harrell v. V. Harrell, 21 Ill. 375, that where false statements are made, with intent to deceive and to fraud, the necessary implication is, that the person making such false statements, with such intent, has a knowledge of their falsity. Otherwise the false character of the representations, and the intent to deceive, could not exist."

With respect to the falsity of the representations, we think the case of Harrell v. V. Harrell, 21 Ill. 375, is expressive of the general rule. In that case suit was brought against a Catholic university by a teacher for alleged breach of an oral contract of employment. The university denied disclosure that plaintiff had been in financial embarrassment of the fact that he had been a Catholic priest, and subsequently left the priesthood, marrying and becoming the father of two children, and was at the time of the suit still a married man. The court held that these conclusions amounted to "fraud". The court held that these conclusions amounted to material and fraudulent misrepresentation, and that the plaintiff as to these things was a deception which induced plaintiff to employ him. Quoting from 13 Ill. 375, 376, 377, the court adopted the general rule that material and false statements, which if they had been known to be false, would not have resulted in the contract entered into. The affidavit presented by defendant and his wife alleged that they made special inquiry with reference to the health of defendant who had married the plaintiff's daughter. It was also alleged, and it is definitely alleged that the plaintiff advised the agent of the lesser work and would not be interested in leaving the plaintiff if times had been any brighter or darker on the plaintiff's health. The trial court's verdict was reversed and the plaintiff's motion to open the judgment on the ground that the

allegations contained in the supporting affidavits as to the fraudulent representations of the agent of the original lessor, in procuring or inducing the execution of the lease in question here, were not misrepresentations as to a material fact. However, sufficient showing is made in the affidavits that defendant and his wife were sensitive and apprehensive about occupying an apartment in which former tenants may have been afflicted with contagious disease; and while such attitude may seem immaterial or fanciful to some, the fact that the prior tenants had been quarantined with contagious diseases on two prior occasions, if known to defendant and fully disclosed before the lease was executed, would, in view of the allegations in the affidavits, probably have resulted in the refusal of the defendant to lease the premises.

We think the motion to open the judgment by confession should be allowed and defendant given an opportunity to present his defense. The orders appealed from are therefore reversed and the cause remanded with directions to open the judgment, to stay the issuance of execution or any supplementary proceedings based on the judgment, to allow defendant's demand for trial by jury, and proceed with the hearing on its merits.

ORDERS REVERSED AND CAUSE
REMANDED WITH DIRECTIONS.

Scanlan, P. J., and Sullivan, J., concur.

allegations contained in the affidavit submitted to the
 present representatives of the agent of the original lessor,
 in proceeding or in making the execution of the lease in question
 here, were not misrepresentations as to a material fact. How-
 ever, sufficient showing is made in the affidavit that defend-
 ant and his wife were sensitive and apprehensive about occupying

an apartment in which former tenants may have been afflicted
 with contagious diseases; and while such condition may seem im-
 material or trifling to some, the fact that the other tenants

had been afflicted with contagious diseases on two other

occasions, if known to defendant and fully disclosed before
 the lease was executed, would, in view of the allegations in
 the affidavit, probably have resulted in the refusal of the
 defendant to lease the premises.

It is thought that the action to open the judgment by con-

cession should be allowed and judgment given in favor of the
 to prevent his defense. The order is reversed from and there-
 fore reversed and the cause remanded with directions to open
 the judgment, to set the issuance of execution on and set-
 tle proceedings based on the judgment, to allow defendant's
 demand for trial by jury, and proceed with the action on the

verdict.

WILLIAM H. W. JAMES, JR.
 ATTORNEY AT LAW

Witness my hand and seal this 1st day of January, 1911.

41664

AUGUST GROSS, PETER CIOLAC
and RUDOLPH TEEGEN,
Appellees,

v.

VILLAGE OF NILES, a Municipal
Corporation, VILLAGE OF NILES
CENTER, a Municipal Corporation,
and EDWARD O. CLARK,
Appellants.

22
80
APPEAL FROM CIRCUIT
COURT, COOK COUNTY.

313 I.A. 263²

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Plaintiffs brought an action in tort for damages occasioned by the alleged negligence of defendants, two of which are corporate villages, in causing or permitting a certain culvert, situated within the territorial limits of both villages, to become and remain obstructed to drainage, whereby plaintiffs' farm lands, drained by said culvert, became flooded, resulting in damage to standing and prospective crops because of injury to the soil. The case was tried by the court and a jury, resulting in the following verdict: "We the jury have not and cannot now agree upon a verdict herein." The jury was thereupon discharged. Defendants had entered three motions in the course of the trial: one for a directed verdict at the close of plaintiffs' evidence; another for a directed verdict at the close of all the evidence; and one for judgment as if the requested verdict had been directed. All the motions were overruled in a consolidated order entered subsequent to the trial. Defendants appeal from that order, which they designate as the "final judgment".

After defendants had perfected their appeal plaintiffs here moved for dismissal thereof on the ground that the order was not final but interlocutory, contending that it did not constitute such a final judgment as is appealable under the provisions of the Civil Practice Act (An Act in Relation to

provisions of the Civil Practice Act (An Act in Relation to
 not constitute such a final judgment as is applicable under the
 order was not final but interlocutory, containing that it did
 this here moved for dismissal thereof on the ground that the
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which they designate as the "final judgment".
 subsequent to the trial. Defendants appeal from that order,
 All the motions were overruled in a consolidated order entered
 one for judgment as if the requested verdict had been directed.
 for a directed verdict at the close of all the evidence; and
 directed verdict at the close of plaintiffs' evidence; another
 entered three motions in the course of the trial: one for a
 herein". The jury was thereupon discharged. Defendants had
 "The jury have not and cannot now agree upon a verdict
 the court and a jury, resulting in the following verdict:

crops because of injury to the soil. The case was tried by
 came flooded, resulting in damage to standing and prospective
 whereby plaintiffs' farm lands, drained by said culvert, be-
 both villages, to become and remain obstructed to drainage,
 certain culvert, situated within the territorial limits of
 which are corporate villages, in causing or permitting a
 occasioned by the alleged negligence of defendants, two of
 Plaintiffs brought an action in tort for damages

MR. JUSTICE PRINCE DELIVERED THE OPINION OF THE COURT.

Appellants,
 and EDWARD O. CLARK,
 CHAIRMAN, a Municipal Corporation,
 CORPORATION, VILLAGE OF NILES
 VILLAGE OF NILES, a Municipal
 v.
 Appellees,
 AUGUST GROSS, BETHE CIOLOG
 and RUDOLPH LANGER

COURT, COOK COUNTY.
 APPEAL FROM CIRCUIT

3181A.363

Practice and Procedure in the Courts of this State, approved June 23, 1933, ch. 110, Ill. Rev. Stat. 1939) and particularly under sec. 77 (par. 201, p. 2437) thereof, and therefore this court is without jurisdiction to entertain the appeal. That motion was reserved to hearing. We think the motion to dismiss must be sustained for the following reasons: The law is well settled that a judgment or decree is final and reviewable when it terminates the litigation on the merits of the case and determines the rights of the parties. Dunavan v. Industrial Comm., 355 Ill. 444, citing Tribune Co. v. Emery Motor Livery Co., 338 Ill. 537, Peabody Coal Co. v. Industrial Comm., 287 Ill. 407, and Rosenthal v. Bd. of Education, 239 Ill. 29. In People v. Stony Island Savings Bank, 355 Ill. 401, it was held that a decree is appealable only when it terminates the litigation between all the parties on the merits and when, if affirmed, the court which rendered it has only to proceed with its execution.

In the case at bar none of the rights or liabilities of any of the parties were determined or adjudicated by the order from which the appeal is prosecuted, denying the respective motions of defendants for directed verdicts. The case on the merits is still pending and the issues thereof are wholly undetermined and subject to retrial, having the same status as before the original trial had begun. The verdict of the jury failed to settle any of the issues in controversy. On retrial defendants may prevail, thus obviating the necessity for an appeal, or plaintiffs may abandon, dismiss or discontinue their case, or on retrial the court may sustain motions for directed verdicts on evidence then adduced by plaintiffs on the hearing.

A similar situation was presented in LeMenager v. Northwestern Barb Wire Co., 296 Ill. App. 568, where an appeal

Practice and Procedure in the Courts of this State, approved June 23, 1933, ch. 110, Ill. Rev. Stat. 1933) and particularly under sec. 77 (par. 201, p. 2437) thereof, and therefore this court is without jurisdiction to entertain the appeal. That motion was reserved to hearing. We think the motion to dismiss must be sustained for the following reasons: The law is well settled that a judgment or decree is final and reviewable when it terminates the litigation on the merits of the case and determines the rights of the parties. Dunaway v. Industrial Corp., 352 Ill. 444, citing Tripp v. Co., 352 Ill. 407, and Ill. 537, Pebody Coal Co. v. Industrial Corp., 357 Ill. 407, and Rosenthal v. Bd. of Education, 239 Ill. 28. In People v. Henry, Island Savings Bank, 352 Ill. 401, it was held that a decree is appealable only when it terminates the litigation between all the parties on the merits and when, if affirmed, the court which rendered it has only to proceed with its execution.

In the case at bar none of the rights or liabilities of any of the parties were determined or adjudicated by the order from which the appeal is presented, leaving the respective motions of defendants for directed verdicts. The case on the merits is still pending and the issues thereof are wholly undetermined and subject to retrial, having the same status as before the original trial had begun. The verdict of the jury failed to settle any of the issues in controversy. On retrial defendants may prevail, thus obviating the necessity for an appeal, or plaintiffs may abandon, dismiss or discontinue their case, or on retrial the court may sustain motions for directed verdicts on evidence then adduced by plaintiffs on the hearing.

A similar situation was presented in Lemmon v. Northwestern Lumber Co., 290 Ill. 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

was taken from an order denying defendant's motion for judgment notwithstanding the verdict, pursuant to the provisions of section 68 (par. 192, p. 2428, ch. 110, ^{Ill.}Rev. Stat. 1939) of the Civil Practice Act. In dismissing the appeal because the order was not final and therefore not appealable but only interlocutory, the court said that "An appeal from the verdict of a jury will not lie. [Citing cases.] There must be a judgment entered on the verdict before there can be a review thereof. The verdict of a jury before it has received the sanction of the court, by passing into a judgment, is not subject to review on appeal in actions such as the present one. *** Hence a judgment in this case could not be regarded as final for purposes of appeal until it had been entered in such a manner that execution might issue thereon."

For the reasons given the motion of plaintiffs to dismiss the appeal is sustained and the appeal is dismissed.

APPEAL DISMISSED.

Scanlan, P. J., and Sullivan, J., concur.

was taken from an order granting defendant's motion for judgment notwithstanding the verdict, pursuant to the provisions of section 68 (Rev. 1927, p. 347, and 110, and 111, Stat. 1939) of the Civil Practice Act. In dismissing the appeal because the order was not final and therefore not appealable but only interlocutory, the court said that "An appeal from the verdict of a jury will not lie. [Citing cases.] There must be a judgment entered on the verdict before there can be a review thereof. The verdict of a jury before it has received the sanction of the court, by passing into a judgment, is not subject to review on appeal in actions such as the present one. *** Hence a judgment in this case could not be regarded as final for purposes of appeal until it had been entered in such a manner that execution might issue thereon."

For the reasons given the motion of plaintiff to dismiss the appeal is sustained and the appeal is dismissed.

APPEAL DISMISSED.

Concur, P. J., and Sullivan, J., concur.

41682

GOLDIE BUEHLER,
(Petitioner) Appellee,

v.

ALBERT C. BUEHLER,
(Respondent) Appellant.

23 41
APPEAL FROM SUPERIOR COURT,
COOK COUNTY.

313 I.A. 264'

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

This is one of three appeals arising subsequent to the entry of a divorce decree by the Superior court October 20, 1937, in favor of Goldie Buehler, petitioner, against Albert C. Buehler, respondent. The decree was predicated on grounds of cruelty. Petitioner's permanent alimony was fixed at \$175 a month and an additional \$75 a month for each of the two children whose custody was awarded to her. The custody of two other children was awarded to respondent. Mrs. Buehler was given all the household goods and an equal interest with respondent in the home occupied jointly by the parties. Petitioner's attorneys were awarded \$4,500 solicitors' fees. On appeal from that decree to the Appellate court the amount of solicitors' fees was increased \$1,500, she was allowed \$1,000 as solicitors' fees for services rendered after the entry of the decree and including the appeal to the Appellate court, her permanent alimony was increased to \$300 and she was awarded custody of the youngest child, which, under the decree, had been awarded to respondent, with support allowance of \$75 a month. (Buehler v. Buehler, 305 Ill. App. 609.) Subsequently, respondent filed a petition in the Supreme Court of Illinois for leave to appeal from the order of the Appellate court, which was allowed, and, in an opinion filed April 10, 1940 (Buehler v. Buehler, 373 Ill. 626), the Supreme Court reversed the Appellate court in so far as it had modified the decree of the Superior court and affirmed the final decree there entered. A petition

GOLDIE BUSHLEY, (Petitioner), Appellee,
v.
ALBERT C. BUSHLEY, (Respondent), Appellant.
COURT OF SUPERIOR COURT,
COOK COUNTY, ILLINOIS.

MR. JUSTICE KATZ DELIVERED THE OPINION OF THE COURT.
This is one of three appeals arising subsequent to the entry of a divorce decree by the Superior Court October 20, 1937, in favor of Goldie Bushley, petitioner, against Albert C. Bushley, respondent. The decree was predicated on grounds of cruelty. Petitioner's permanent alimony was fixed at \$175 a month and an additional \$75 a month for each of the two children whose custody was awarded to her. The custody of two other children was awarded to respondent. Mrs. Bushley was given all the household goods and an equal interest with respondent in the home occupied jointly by the parties. Petitioner's attorneys were awarded \$4,700 solicitors' fees. On appeal from that decree to the Appellate Court the amount of solicitors' fees was increased \$1,200, she was allowed \$1,000 as solicitors' fees for services rendered after the entry of the decree and including the appeal to the Appellate Court, her permanent alimony was increased to \$200 and she was awarded custody of the youngest child, which, under the decree, had been awarded to respondent, with support allowance of \$75 a month. (Bushley v. Bushley, 305 Ill. App. 600.) Subsequently respondent filed a petition in the Supreme Court of Illinois for leave to appeal from the order of the Appellate Court, which was allowed, and, in an opinion filed April 10, 1940 (Bushley v. Bushley, 373 Ill. 626), the Supreme Court reversed the Appellate Court in so far as it had modified the decree of the Superior Court and affirmed the final decree there entered. A petition

for rehearing was later denied by the Supreme court, rendering the decree of the Superior court final and conclusive.

While the petition for leave to appeal was pending in the Supreme court, Mrs. Buehler, June 30, 1939, filed a petition in the Superior court alleging that she desired to file an answer to the petition for leave to appeal, that further proceedings may be required in the Supreme court in connection with the petition for leave to appeal and her answer thereto, that it had become necessary to employ counsel to prepare such answer, to pay appearance fee, printers' bills, cost of additional transcript and possible other outlays, and to attend to further proceedings in the Supreme court; and she asked that respondent be ruled to pay reasonable suit money and attorneys' fees in connection with proceedings then pending in the Supreme court.

In his answer to this petition, filed July 14, 1939, respondent averred that the petition was prematurely filed; that under par. 16, chap. 40, Ill. Rev. Stats. 1937, "In case of appeal by the *** wife, the court in which the decree or order is rendered may grant and enforce the payment of such money for her *** defense *** during the pendency of the appeal as to such court shall seem reasonable and proper" (italics ours); that it was apparent from the face of the petition that no appeal was then pending, since, if leave to appeal should be denied, there would be no occasion for further proceedings; and respondent accordingly asked that the petition be stricken.

July 21, 1939, the court entered an order on the petition and answer, requiring respondent to pay petitioner, for and on account of attorneys' fees and costs to defend the petition then pending in the Supreme court, the sum of \$250 within fifteen days thereafter.

In obedience to this order respondent's counsel, August 4, 1939, addressed a letter to Mrs. Buehler's attorney, enclosing

for rehearing was later denied by the supreme court, rendering the decree of the superior court final and conclusive.

While the petition for leave to appeal was pending in the supreme court, Mrs. Blomberg, June 30, 1939, filed a petition in the superior court alleging that she desired to file an answer to the petition for leave to appeal, that further proceedings may be required in the supreme court in connection with the petition for leave to appeal and her answer thereto, that it had become necessary to employ counsel to prepare such answer, to pay appearance fee, printers' bills, cost of additional proceedings and possible other outlays, and to attend to further proceedings in the supreme court; and she asked that respondent be ruled to pay reasonable said money and attorneys' fees in connection with proceedings then pending in the supreme court.

In his answer to this petition, filed July 14, 1939, respondent averred that the petition was prematurely filed; that under par. 15, chap. 40, Ill. Rev. Stat. 1937, "in case of appeal by the *** etc., the court in which the decree or order is rendered may grant and enforce the payment of such money for her *** defense *** during the pendency of the *** as to such court shall seem reasonable and proper" (italics ours); that it was apparent from the face of the petition that no appeal was then pending, since, if leave to appeal should be denied, there would be no occasion for further proceedings; and respondent accordingly asked that the petition be withdrawn.

July 21, 1939, the court entered an order on the petition and answer, requiring respondent to pay petitioners' fees and costs of attorneys' fees and costs to defend the petition then pending in the supreme court, the sum of \$100 within fifteen days thereafter.

In obedience to this order respondent's counsel, August 4, 1939, addressed a letter to Mrs. Blomberg's attorney, enclosing

check for \$250 "to be applied upon such indebtedness as may ultimately be determined to be due from Mr. A. C. Buehler to Mrs. Goldie Buehler under and pursuant to divorce decree which may ultimately and finally be entered in this proceeding, including attorney's fees." The letter stated that payment was being made without prejudice to the rights of either party and to any claim which either Mr. or Mrs. Buehler might thereafter assert in the proceeding and that it was not to be considered as any waiver of error by either of the parties in interest.

October 31, 1939, Mrs. Buehler filed another petition in the Superior court reciting the decree, the modification thereof by the Appellate court, the order of the Supreme court allowing the appeal from the Appellate court, and alleging that in the ordinary course of the hearing on the latter appeal she would be required to file printed briefs and arguments and to probably appear before the Supreme court by her counsel on oral argument of the cause; that in order to properly defend the appeal by respondent she would be required to employ counsel and compensate them for their services; that she was without income or funds other than those being paid to her by respondent under the order and decree of the Superior court, and was therefore unable to compensate her attorneys unless respondent should be ordered to pay her a reasonable amount for such purposes; and she therefore sought an order on respondent to pay her for her attorneys such compensation for services as, in the judgment of the court, would be reasonable and proper.

No order was entered on this petition, but after the Supreme court had filed its opinion April 10, 1940, Buehler v. Buehler, 373 Ill. 626, Mrs. Buehler had leave to file a further petition June 12, 1940, wherein she recited the proceedings had in the Supreme court and alleged that she was put to considerable expense, which is

check for \$100 to be applied upon such indebtedness as may ultimately be determined to be due from Mr. J. B. Wheeler to Mrs. Golda Wheeler and payment to divorce decree which may ultimately and finally be entered in this proceeding, including attorney's fees." The latter stated that payment was being made without prejudice to the rights of either party and to any claim which either Mr. or Mrs. Wheeler might thereafter assert in the proceeding and that it was not to be considered as any waiver of error by either of the parties in interest.

October 31, 1939, Mrs. Wheeler filed another petition

in the Superior Court reciting the decree, the modification thereof by the appellate court, the order of the Supreme Court allowing the appeal from the appellate court, and stating that in the ordinary course of the hearing on the latter appeal she would be required to file printed briefs and arguments and to probably appear before the Supreme Court by her counsel on oral argument of the case; that in order to properly defend the appeal by respondent she would be required to employ counsel and counsel state team for their services; that she was without income or funds other than those being paid to her by respondent under the order and decree of the Superior Court, and was therefore unable to compensate her attorneys unless respondent should be ordered to pay her a reasonable amount for such purposes; and she therefore sought an order on respondent to pay for her attorneys such compensation for services as, in the judgment of the court, would be reasonable and proper.

No order was entered on this petition, but after the Supreme Court had filed its opinion April 10, 1940, Wheeler v. Wheeler, 131 Ill. 626, Mrs. Wheeler had leave to file a further petition June 12, 1940, wherein she recited the proceedings had in the Supreme Court and stated that she was not to compensate expenses, which is

itemized in statement attached to petition as exhibit "B"; that as a result of this proceeding the matter had been finally disposed of by the Supreme court, which reversed the Appellate court insofar as it had modified the decree of the Superior court and affirmed the decree of the Superior court in all respects; that a reasonable, usual and customary compensation to attorneys for services such as were rendered by her counsel in the matter of the appeal to the Supreme court, was \$4,500; that July 21, 1939, she had presented to the Superior court a petition for allowance of her attorneys' fees in the matter of defending against the petition for leave to appeal in the Supreme court, pursuant to which the court had awarded her \$250 on account for attorneys' fees and outlays, which amount was paid by respondent; and she asked that an order be entered in the Superior court directing and requiring respondent to pay her \$4,500, or such sum as the court might adjudge to be reasonable, usual and proper, together with the aggregate of \$201.50, which she had laid out and expended in defending the Supreme court proceeding. There was attached to this petition an itemized statement of services rendered by Mrs. Buehler's counsel, aggregating 216 hours, in addition to one day spent in making the oral argument before the Supreme court, and itemized bills for printing briefs, and traveling expenses to Springfield, in the sum of \$201.50.

Respondent's answer to this petition filed June 20, 1940, admitted that legal services had been rendered by counsel for Mrs. Buehler in the Supreme court, but disclaimed any knowledge as to the extent or necessity of the services; he denied that \$4,500 was the reasonable, usual and customary compensation and that petitioner was entitled to an order directing him to pay any sum whatsoever on account of services; he averred that the Supreme court in Buehler v. Buehler, supra, had specifically held "that petitioner is not entitled to fees on appeal in this case where she did not defend

itemized in statement attached to petition as Exhibit "A"; that as a result of this proceeding the matter had been finally disposed of by the Supreme court, which reversed the Appellate court insofar as it had modified the degree of the Superior court and affirmed the degree of the Superior court in all respects; that a reasonable, usual and customary compensation to attorneys for services such as were rendered by her counsel in the matter of the appeal to the Supreme court, was \$4,500; that July 11, 1939, she had presented to the Superior court a petition for allowance of her attorneys' fees in the matter of defending against the petition for leave to appeal in the Supreme court, pursuant to which the court had awarded her \$250 on account for attorneys' fees and outlays, which amount was paid by respondent; and she asked that an order be entered in the Superior court directing and requiring respondent to pay her \$4,500, or such sum as the court might adjudge to be reasonable, usual and proper, together with the aggregate of \$201.50, which she had paid out and expended in defending the Supreme court proceeding. There was attached to this petition an itemized statement of services rendered by Mrs. Buchler's counsel, aggregating 216 hours, in addition to one day spent in making the oral argument before the Supreme court, and itemized bills for printing bills, and traveling expenses to Springfield, in the sum of \$201.50.

Respondent's answer to this petition filed June 2, 1940, admitted that legal services had been rendered by counsel for Mrs. Buchler in the Supreme court, but disclaimed any knowledge as to the extent or necessity of the services; he denied that \$4,500 was a reasonable, usual and customary compensation and that petitioner was entitled to an order directing him to pay any and whatsoever on account of services; he averred that the Supreme court in Buchler v. Buchler, supra, had specifically held "that petitioner is not entitled to fees on appeal in this case where she did not demand

the order or decree of this court, but was attempting to reverse and set aside the order and decree of this court;" that the Superior court was not the court in which the decree or order was rendered from which an appeal was taken by respondent, but that the decree from which he appealed was rendered by the Appellate court, and that respondent never appealed from the decree of the Superior court, but has at all times attempted to sustain and defend that decree. The answer sets forth the pertinent provisions of par. 16, chap. 40, Ill. Rev. Stats. 1939 upon which he predicates the contention that the Superior court was without jurisdiction to enter an order requiring him to pay fees for services rendered in the Supreme court, and he asked that the prayer of the petition be disallowed.

Respondent had leave to amend his answer to the petition filed June 12, 1940, by an allegation that Mrs. Buehler had prosecuted a cross appeal to the Supreme court and assigned cross errors on all matters except one upon which respondent assigned errors in the Supreme court; that a substantial portion of the services rendered by petitioner's counsel in the Supreme court was on matters in no way connected with the prosecution of the appeal from the Appellate court, but was directed to the cross errors assigned; and therefore petitioner was not, under the statute, entitled to any attorneys' fees or defense money for services rendered to her by her attorneys, or any other expenses incurred in connection with the Supreme court proceeding.

Pursuant to the hearing of the amended petition and answer, "upon evidence adduced by the plaintiff in support of such petition, and upon argument of counsel, both on behalf of the plaintiff and the defendant," the court found, among other things, from the testimony of the attorneys representing Mrs. Buehler, "that subsequent to the allowance of the petition for leave to appeal, not to

the order or decree of this court, but was attempting to reverse and set aside the order and decree of this court; that the Superior court was not the court in which the decree or order was rendered from which an appeal was taken by respondent, but that the decree from which he appealed was rendered by the Appellate court, and that respondent never appealed from the decree of the Superior court, but has at all times attempted to sustain and defend that decree. The answer sets forth the pertinent provisions of par. 15, chap. 40, Ill. Rev. Stats. 1913 upon which he predicates the contention that the Superior court was without jurisdiction to enter an order requiring him to pay fees for services rendered in the Supreme court, and he asked that the prayer of the petition be disallowed.

Respondent had leave to amend his answer to the petition filed June 12, 1940, by an allegation that Mrs. Mueller had cross-acted a cross appeal to the Supreme court and assigned cross errors on all matters except one upon which respondent assigned errors in the Supreme court; that a substantial portion of the services rendered by petitioner's counsel in the Supreme court was on matters in no way connected with the prosecution of the appeal from the Appellate court, but was directed to the cross errors assigned; and therefore petitioner was not, under the statute, entitled to any attorneys' fees or defense money for services rendered to her by her attorneys, or any other expenses incurred in connection with the Supreme court proceedings.

Pursuant to the hearing of the amended petition and answer, "upon evidence advanced by the plaintiff in support of such petition and upon argument of counsel, both on behalf of the plaintiff and the defendant," the court found, among other things, from the testimony of the attorneys representing Mrs. Mueller, "that pursuant to the allowance of the petition for leave to appeal, not to

exceed ten per cent (10%) of the time and labor spent by them in connection with the appeal in the Supreme court of Illinois, as shown on the statement attached to plaintiff's petition for fees, was exclusively in support of or in connection with her cross errors; that the balance of the time and labor spent, as shown on said statement, was in support of or in defense of the judgment of the Appellate Court" (italics ours); that the usual and proper compensation for services necessarily rendered amounted to \$1,915, and the amounts necessarily laid out and expended by petitioner in connection with the appeal to the Supreme court, exclusive of such amounts as were expended in connection with cross errors, amounted to \$185.. Accordingly, the court ordered respondent to pay petitioner the aggregate sum of \$2,100. Respondent appeals from the order entered.

It may be conceded that, in the absence of specific statutory authority, courts in this state have no jurisdiction to award solicitors' fees to the contesting parties. Smith v. Johnson, 321 Ill. 134. The controversy here arises over the construction of par. 16, chap. 40, Ill. Rev. Stats. 1939, which provides: "In case of appeal by the husband or wife, the court in which the decree or order is rendered may grant and enforce the payment of such money for her or his defense and such equitable alimony during the pendency of the appeal as to such court shall seem reasonable and proper." It is first urged by respondent that where an appeal is taken by the husband or wife, only the court in which the decree or order is rendered may grant and enforce payment of suit money, and his counsel say that since respondent was not appealing from the decree or order of the Superior court, but from the decree or order of the Appellate court, the statute afforded no authority to the Superior court to allow fees for services rendered in the Supreme court proceeding. The implication of this argument is that since respondent was

exceed ten per cent (10%) of the time and labor spent by them in connection with the appeal in the Supreme Court of Illinois, as shown on the statement attached to defendant's petition for fees, was exclusively in support of or in connection with the cross errors; that the balance of the time and labor spent, as shown on said statement, was in support of or in connection with the of the Appellate Court (italics ours); that the usual and proper compensation for services necessarily rendered amounted to \$1,111, and the amounts necessarily laid out and expended by defendant in connection with the appeal to the Supreme Court, exclusive of such amounts as were expended in connection with cross errors, amounted to \$185. Accordingly, the court ordered respondent to pay defendant the aggregate sum of \$2,100. Respondent appeals from the order entered.

It may be conceded that, in the absence of specific statutory authority, courts in this state have no jurisdiction to award attorneys' fees to the contesting parties. Wright v. Johnson, 321 Ill. 134. The controversy here arises over the construction of par. 10, chap. 40, Ill. Rev. Stats. 1939, which provides: "In case of appeal by the husband or wife, the court in which the decree or order is rendered may grant and enforce the payment of such money for her or his defense and such equitable alimony during the pendency of the appeal as to such court shall seem reasonable and proper." It is first urged by respondent that where an appeal is taken by the husband or wife, only the court in which the decree or order is rendered may grant and enforce payment of said money, and his counsel say that since respondent was not appealing from the decree or order of the Superior Court, but from the decree or order of the Appellate Court, the statute afforded no authority to the Superior Court to allow fees for services rendered in the Supreme Court proceeding. The implication of this argument is that since respondent was

appealing from the decree of the Appellate court, only that court could grant or enforce payment of money for the defense interposed by Mrs. Buehler in the Supreme court, but obviously that is not the intent of the statute, for the court said in Buehler v. Buehler, 373 Ill. 626, that "No authority has been furnished authorizing the Appellate court to fix solicitors' fees where the wife prosecutes the appeal," and that under the statute only the court in which the decree or order is rendered may require payment of money for the wife's or husband's defense pending the appeal. The order appealed from was entered by "the court in which the decree or order is rendered," namely, the court in which the decree of divorce was rendered. In Harding v. Harding, 205 Ill. 105, which was one of several appeals taken from various portions of the decree in that proceeding, Harding, the husband, appealed first to the Appellate court, and, by further appeal, brought the case to the Supreme court. During the pendency of these appeals the wife filed a petition in the Circuit court for the allowance of solicitors' fees "for services rendered in prosecuting them [the two appeals]," and it was contended that the Circuit court was without jurisdiction to entertain the petition, but the Supreme court held that the "contention is without merit."

It is next argued that the statute confers jurisdiction to allow defense money only where it is "'for her DEFENSE of the decree or order of the court' rendering such decree or order appealed from." Two cases are cited in support of this contention: Seeger v. Seeger, 154 Ill. App. 38; Shaffer v. Shaffer, 219 Ill. App. 200. In the Seeger case the husband brought suit for divorce against his wife on the ground of extreme and repeated cruelty, and had a decree in his favor. The wife appealed and the court held that it was not improper for the court to deny suit money for the purpose of allowing her to prosecute an appeal, especially since she had means of her own and had been the recipient of an antenuptial settlement. In the Shaffer case the wife's bill for divorce

appealing from the decree of the appellate court, only that court could grant or enforce payment of money for the husband's maintenance by Mrs. Butler in the Supreme court, but obviously that is not the intent of the statute, for the court said in Butler v. Butler, 373 Ill. 626, that "no authority has been furnished authorizing the Appellate court to fix solicitors' fees where the wife prosecutes the appeal," and that under the statute only the court in which the decree or order is rendered may require payment of money for the wife's or husband's defense pending the appeal. The order appealed from was entered by "the court in which the decree or order is rendered," namely, the court in which the decree of divorce was rendered. In Harding v. Harding, 307 Ill. 102, which was one of several appeals taken from various portions of the decree in that proceeding, Harding, the husband, appealed first to the Appellate court, and, by further appeal, brought the case to the Supreme court. During the pendency of these appeals the wife filed a petition in the Circuit court for the allowance of solicitors' fees "for services rendered in prosecuting them [the two appeals]," and it was contended that the Circuit court was without jurisdiction to entertain the petition, but the Supreme court held that the "contention is without merit."

It is next argued that the statute confers jurisdiction to allow defense money only where it is "for her portion of the decree or order of the court," rendering such decree or order appealed from. Two cases are cited in support of this contention: Geary v. Geary, 154 Ill. App. 38; Shaffer v. Shaffer, 219 Ill. 100. In the Geary case the husband brought suit for divorce against his wife on the ground of extreme and repeated cruelty, and had a decree in his favor. The wife appealed and the court held that it was not improper for the court to deny suit money for the purpose of allowing her to prosecute an appeal, especially since she had means of her own and had been the recipient of an antenuptial settlement. In the Shaffer case the wife's bill for divorce

was dismissed for want of equity and then she appealed. The court held that under the statute she was not entitled to an order, pending the appeal from the decree against her, requiring her husband to pay alimony, solicitor's fees and costs. Neither of these decisions throws any light on the question here presented. Mrs. Buehler, who filed the complaint in the Superior court, had a decree in her favor granting a divorce, the allowance of alimony and support for the children placed in her custody, solicitors' fees and the settlement of her property rights. By her appeal to the Appellate court she sought a modification of the Superior court decree. The Appellate court, having modified the decree in several respects but not in respect to the principal relief sought, namely, the severance of the marital relationship between the parties, remanded the cause with directions to amend the decree in conformance with its views, and respondent then prayed and had leave to appeal to the Supreme court from the order of the Appellate court, where he obtained an order which was nothing more, in effect, than the reversal of the modifications made in the Appellate court order and the affirmance of the decree of the Superior court. The appeal to the Supreme court was prosecuted by the respondent, and it cannot well be argued that Mrs. Buehler appealed from the judgment of the Appellate court, for she was satisfied with the order here entered, at least to the extent of not desiring to appeal. When the petition for leave to appeal was filed in the Supreme court, she opposed that petition and was, in fact, seeking to defend the order of the Appellate court, except as to some cross errors, which she would, of course, not have had occasion to urge if respondent had not prosecuted the appeal to the Supreme court. The judgment of the Appellate court as it was rendered by its order of reversal merely superseded, in part, the judgment of the Superior court, which was thereby modified to the extent of that reversal, and when respondent appealed to the Supreme court, petitioner was

was dismissed for want of ability and then she appealed. The court held that under the statute she was not entitled to an order, granting the appeal from the decree against her, requiring her husband to pay alimony, notwithstanding the fact that she was not a party to the decision. The court then threw away light on the question by saying that the decision was not a decree in her favor granting a divorce, the allowance of alimony and support for the children placed in her custody, notwithstanding the fact that the settlement of her property rights, by her appeal to the appellate court and sought a modification of the divorce court decree. The appellate court, having modified the decree in several respects but not in respect to the principal relief sought, namely, the severance of the marital relationship between the parties, remanded the cause with directions to amend the decree in conformance with its views, and respondent then prayed and had leave to appeal to the Supreme Court from the order of the appellate court, where he obtained an order which was nothing more, in effect, than the reversal of the modifications made in the appellate court order and the affirmance of the decree of the divorce court. The appeal to the Supreme Court was prosecuted by the respondent, and it cannot well be argued that Mrs. Bushier appealed from the judgment of the appellate court, for she was satisfied with the order here entered, at least to the extent of not desiring to appeal. When the petition for leave to appeal was filed in the Supreme Court, she opposed that petition and was, in fact, seeking to affirm the order of the appellate court, except as to some gross errors, which she would, of course, not have had occasion to urge if respondent had not prosecuted the appeal to the Supreme Court. The judgment of the appellate court as it was rendered by its order of reversal merely superseded, in part, the judgment of the divorce court, which was thereby modified to the extent of that reversal, and when respondent appealed to the Supreme Court, petition was

faced with the necessity of defending against that appeal. The fact that the Supreme court afterward reversed the judgment of the Appellate court affords no reason for denying petitioner suit money and attorneys' fees. Jenkins v. Jenkins, 81 Ill. 167.

Mrs. Buehler's counsel argue, with considerable force, that respondent is in no position to question the authority of the Superior court to allow attorneys' fees and suit money in the Superior court proceeding, because the order of July 21, 1939, from which no appeal was prosecuted, is res adjudicata, and that the court did have such authority. That order was entered pursuant to the first petition filed by Mrs. Buehler, while the petition for leave to appeal to the Supreme court was still pending and before the court had indicated whether or not it would allow the petition for leave to appeal. Respondent opposed the allowance of fees at that time and interposed an answer in which he asked that the petition be stricken. Nevertheless, the court entered an order on the petition and answer, requiring respondent to pay, for and on account of attorneys' fees and costs to defend the petition then pending in the Supreme court, \$250. Respondent complied with this order by paying the stipulated sum, with certain reservations hereinbefore set forth, and although the order then entered made provision for an appeal therefrom by ordering "that the defendant is allowed 90 days in which to present a report of proceedings" and "In event of notice of appeal" fixed the bond at \$500, respondent never exercised his right to question the jurisdiction of the court to enter an order under par. 16, chap. 40 of the Revised Stats. of Ill. 1939 by appealing from that order. Thereafter, Mrs. Buehler filed another petition on October 31, 1939, advising the court that the petition for leave to appeal had been allowed by the Supreme court and finally, on June 12, 1940, after an opinion had been rendered in the Supreme court, she asked for

faced with the necessity of doing so. The fact that the Supreme Court afterwards reversed the judgment of the Appellate Court affords no reason for denying petitioner suit money and attorneys' fees. Leahy v. Leahy, 81 Ill. 107. Mrs. Bucher's counsel argued, with considerable force, that respondent is in no position to question the authority of the Superior Court to allow attorneys' fees and suit money in the Superior Court proceeding, because the order of July 21, 1939, from which no appeal was presented, is res judicata, and that the court did have such authority. That order was entered pursuant to the first petition filed by Mrs. Bucher, while the petition for leave to appeal to the Supreme Court was still pending and before the court had indicated whether or not it would allow the petition for leave to appeal. Respondent opposed the allowance of fees at that time and interposed an answer in which he stated that the petition be stricken. Nevertheless, the court entered an order on the petition and answer, requiring respondent to pay, for and on account of attorneys' fees and costs to be paid the petition then pending in the Supreme Court, \$250. Respondent complied with this order by paying the stipulated sum, with certain reservations heretofore set forth, and although the order then entered made provision for an appeal therefrom by ordering "that the defendant is allowed 90 days in which to present a report of proceedings" and "in event of notice of appeal, filed the bond of \$250," respondent never exercised his right to question the jurisdiction of the court to enter an order under p. 10, ch. 40 of the Revised Stats. of Ill. 1939 by appealing from that order. Thereafter, Mrs. Bucher filed another petition on October 21, 1939, advising the court that the petition for leave to appeal had been allowed by the Supreme Court and finally, on June 12, 1940, after an opinion had been rendered in the Supreme Court, she asked for

the allowance of fees and specified the details of the services rendered and the money expended in defending the appeal. We think that the original order of July 21, 1939, allowing petitioner \$250 on account of attorneys' fees and costs to defend the petition in the Supreme court, constituted an adjudication, fixing the rights of the parties in the matter of fees for attorneys' services in defending against respondent's appeal, and that in the subsequent hearing and order entered thereon, the court merely exercised the right to pass upon the value of the services of petitioner's counsel, for which an award of \$250 had been made on account in the original order. Respondent's counsel say that the principle of res adjudicata is not applicable because the court had no jurisdiction of the subject matter to allow fees, and the order entered July 21, 1939, therefore could not be an adjudication of the parties' rights. In view of our conclusion that the court had jurisdiction under the statute, and our construction of the statute, as heretofore indicated, this contention is untenable.

Lastly it is urged that the award was excessive, since, in any event, fees should not be allowed petitioner for prosecution of her cross errors in the Supreme court. Respondent's counsel say that the evidence was vague and uncertain as to the proportionate time spent for defending the appeal and the prosecution of cross errors assigned by petitioner. Mrs. Buehler's attorneys testified that the time devoted to the prosecution of cross errors constituted less than 10 per cent of the services rendered in the Supreme court. The chancellor, in his order for the allowance of fees, found "that subsequent to the allowance of the petition for leave to appeal, not to exceed ten per cent (10%) of the time and labor spent by them in connection with the appeal in the Supreme court of Illinois, as shown on the statement attached to plaintiff's petition for fees, was exclusively in support of or in connection with her cross errors; that the balance of the time and labor spent, as shown on said state-

the allowance of fees and specified the details of the services rendered and the money expended in defending the appeal. The court that the original order of July 21, 1939, allowing petitioner \$250 on account of attorneys' fees and costs to defend the petition in the Supreme Court, constituted an adjudication, fixing the rights of the parties in the matter of fees for attorneys' services in defending against respondent's appeal, and that in the subsequent hearing and order entered thereon, the court merely exercised the right to pass upon the value of the services of petitioner's counsel, for which an award of \$250 had been made on account in the original order. Respondent's counsel say that the principle of res adjudicata is not applicable because the court had no jurisdiction of the subject matter to allow fees, and the order entered July 21, 1939, therefore could not be an adjudication of the parties' rights. In view of our conclusion that the court had jurisdiction under the statute, and our construction of the statute, as heretofore indicated, this contention is untenable.

Lastly it is urged that the award was excessive, since, in any event, fees should not be allowed petitioner for prosecution of her cross errors in the Supreme Court. Respondent's counsel say that the evidence was vague and uncertain as to the proportionate time spent for defending the appeal and the prosecution of cross errors assigned by petitioner. Mrs. Bushnell's attorneys testified that the time devoted to the prosecution of cross errors constituted less than 10 per cent of the services rendered in the Supreme Court. The Chancellor, in his order for the allowance of fees, found "that" subsergent to the allowance of the petition for leave to appeal, not to exceed ten per cent (10%) of the time and labor spent by counsel in connection with the appeal in the Supreme Court of Illinois, as shown on the statement attached to petitioner's petition for leave, was exclusively in support of or in connection with her cross errors; that the balance of the time and labor spent, as shown on said state-

ment, was in support of or in defense of the judgment of the Appellate court." There was no countervailing proof and the record sustains this finding. However, the allowance of fees was based primarily on a time basis. The statement attached to the petition showed that 216 hours and one extra day for oral argument had been devoted to the appeal in the Supreme court.

This was equivalent to more than 30 days. Petitioner's brief in the Supreme court involved the same facts and substantially the same propositions of law as were argued in the Appellate court appeal, and counsel for petitioner were thoroughly familiar with both the facts and the law. In our former opinion we expressed the view that \$1,000 would amply compensate petitioner's counsel for the services rendered in the appeal to the Appellate court. Although we had no time basis for arriving at this conclusion, we were sufficiently informed of the questions involved and the character of the services required to express judgment as to the value of these services, and it seemm to us the amount of \$1,000 would fairly compensate petitioner's counsel for defending the appeal in the Supreme court, involving the same subject matter and questions of law.

The order of the Superior court is, therefore, affirmed in all respects except as to the amount of solicitors' fees, and as to such amount, it is reversed and the cause remanded with directions that the order be modified so as to award petitioner \$1,000 as fees for her solicitors in the Supreme court proceeding, and the additional sum of \$185 for expenses incurred.

ORDER OF THE SUPERIOR COURT PARTLY
AFFIRMED AND PARTLY REVERSED WITH
DIRECTIONS.

Scanlan, P. J., and Sullivan, J., concur.

ment, was in support of the defense of the appellant. The record sustains this finding. However, the appellant's brief was based primarily on a false basis. The statement referred to the petition showed that the money was not paid for the appeal and had been devoted to the appeal in the wrong sense. This was equivalent to more than \$1,000. The appellant's brief in the Supreme Court involved the same facts and legal principles the same propositions of law as were argued in the appellate court appeal, and counsel for petitioner were repeatedly familiar with both the facts and the law. In our former opinion we expressed the view that \$1,000 would amply compensate petitioner's counsel for the services rendered in the appeal to the Appellate Court. Although we had no time basis for arriving at this conclusion, we were sufficiently informed of the questions involved and the character of the services required to express judgment as to the value of these services, and it seems to us the amount of \$1,000 would fairly compensate petitioner's counsel for determining the appeal in the Supreme Court, involving the same subject matter and questions of law. The order of the Superior Court is, therefore, affirmed in all respects except as to the amount of petitioner's fees, and as to such amount, it is reversed and the case remanded with directions that the order be modified so as to award petitioner \$1,000 as fees for her solicitors in the Supreme Court proceeding, and the additional sum of \$187 for expenses incurred.

ORDER OF THE SUPREME COURT
APPEAL FROM THE SUPERIOR COURT
DISTRIBUTION

Connelly, J., and Sullivan, J., dissent.

41699

CARL ROEHRI and MARIE ROEHRI,
copartners trading as FEDERAL
DIE CASTING COMPANY,
Appellees,

v.

WILLIAM SCHWALGE, trading as
RECLAIMO MANUFACTURING COMPANY,
Appellant.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

313 I.A. 264²

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Carl and Marie Roehri, copartners trading as Federal Die Casting Company, brought suit for a balance of \$278.35 and interest, alleged to be due on an account for the manufacture of dies and die casting parts for an oil filter invented and manufactured by defendant William Schwalge, trading as Reclamo Manufacturing Company. Defendant interposed a counterclaim contending that the castings were not suitable for the purpose intended, that plaintiffs committed a breach of warranty, resulting in damages to him in excess of plaintiffs' claim for which he asked judgment. The cause was tried by the court without a jury, resulting in findings and judgment in favor of plaintiffs on their statement of claim for \$286.69 and costs, and against defendant on his counterclaim, which the court dismissed. Defendant seeks a review and reversal of the order entered.

We find in defendant's brief no such concise statement as is required by Rule 7, Rules of Practice in the Appellate Court, and his counsel suggests "that no true or satisfactory impression of this matter can be gathered, without an examination of the entire record," which consists of more than 600 pages and is embraced in an abstract of record of 289 printed pages. However, from an examination of the pleadings and so much of the abstract as was necessary to afford an understanding of the

CARL ROBERT and MARIE ROBERT,
 copartners trading as FERNALD
 DIE CASTING COMPANY,
 Appellants,

v.

WILLIAM SCHWABER, trading as
 RECLAMING MANUFACTURING COMPANY,
 Appellee.

SPECIAL APPEAL
 COURT OF CHIEF JUSTICE

MR. JUSTICE PRINCE delivered the opinion of the court.
 Carl and Marie Robert, copartners trading as Fernald
 Die Casting Company, brought suit for a balance of \$275.32
 and interest, alleged to be due on an account for the manu-
 facture of dies and die casting parts for an oil filter ma-
 chine manufactured by defendant William Schwaber, trading
 as Reclaiming Manufacturing Company. Defendant introduced
 counterclaims contending that the castings were not suitable
 for the purpose intended, that plaintiff committed a breach
 of warranty, resulting in damages to him in excess of plaintiff's
 claim for which he asked judgment. The case was tried by the
 court without a jury, resulting in findings and judgment in
 favor of plaintiff on both its claim for \$275.32 and
 costs, and against defendant on his counterclaim, with the
 court dismissing defendant's motion for a new trial and
 order entered.
 The first in defendant's brief to such consists of a statement
 as is required by Rule 7, which of course in the appellate
 court, and his counsel suggests "that no trial or satisfactory
 impression of this matter can be formed, without an examination
 of the entire record," which consists of more than 500 pages and
 is embraced in an abstract of record of 203 printed pages. How-
 ever, from an examination of the findings and so much of the
 abstract as was necessary to afford an understanding of the

issues involved, the salient facts may be summarized as follows: Defendant had invented and was manufacturing an oil filter known as "Reclamo," which was attached to the manifold and used in connection with the operation of automobile engines. This filter had been made of aluminum. In the fall of 1938, one Robert J. Dunne, plaintiffs' sales engineer, called on defendant for the purpose of trying to get his sand casting business. Defendant told Dunne that he was changing some of the parts of his filter from sand to die castings, and requested Dunne to bid on the job. Prior thereto, defendant had become interested in die castings made from a white brass metal, commonly known as "Zamac," through his son, who had visited the Alloy Metal Show and told him about Zamac metal. Defendant wanted to change from sand to die castings to induce smoother operation of the mechanism and was, at the same time, interested in employing a different type of metal than aluminum. Two or three other die casting concerns were bidding for his work, all of them proposing to use a white brass metal. It was after bids had been received from the other concerns that Dunne called on defendant and requested some of his business.

As a result of Dunne's call, a contract was signed by the parties December 6, 1938. Thereafter, plaintiffs prepared a blueprint from a specimen part furnished by defendant, which was later approved by defendant, and the first sample part manufactured by plaintiffs was delivered January 13, 1939. After some changes were made, the second samples were delivered January 27 of that year. These samples were made of white brass metal and were approved by defendant, who, February 3, 1939, placed an order for 500 sets of parts, which were promptly made, and those parts, found on inspection by defendant to be defective, were thereafter replaced. Although the evidence does not disclose how many parts made up the filter or who manufactured them, plaintiffs were at

issues involved, the salient facts may be summarized as follows:
Defendant had invented and was manufacturing an oil filter known
as "Gee-Lite", which was attached to the manifold and used in
connection with the operation of automobile engines. This filter
had been made of aluminum. In the fall of 1933, one Robert J.
Dunn, plaintiff's sales engineer, called on defendant for the
purpose of trying to get him some casting business. Defendant
told Dunn that he was engineering some of the parts of his filter
from sand to the castings, and requested Dunn to bid on the job.
Prior thereto, defendant had become interested in the castings
made from a white brass metal, commonly known as "white", through
his son, who had visited the Elroy Metal Shop and told him about
same metal. Defendant wanted to change from sand to the castings
to induce another operation of the mechanics and was, at the same
time, interested in supplying a different type of metal than
aluminum. Two or three other the casting concerns were bidding
for his work, all of them proposing to use a white brass metal.
It was after this had been received from the other concerns that
Dunn called on defendant and requested some of his business.
As a result of Dunn's call, a contract was entered into by the
parties December 6, 1933. Thereafter, plaintiff prepared a blue-
print from a specimen part furnished by defendant, which was later
approved by defendant, and the first sample part manufactured by
plaintiff was delivered January 11, 1934. After some other parts
were made, the second sample was delivered January 15 of that
year. These sample parts were made of white brass metal and were
approved by defendant, who, February 11, 1934, placed an order
for 500 sets of parts, which were promptly made, and these parts
found on inspection by defendant to be satisfactory, were thereupon
rejected. Although the evidence does not disclose how many parts
were up to the filter or who manufactured them, plaintiff's sales

that time making three of the parts and the complete filters were assembled at defendant's plant. February 11, 1939, defendant ordered an additional 1,000 sets, on March 9 another 1,000 were ordered, and June 28 of that year a final order for 3,500 sets was placed with plaintiffs. All these orders were filled and shipped, the last installment of several hundred sets being received by defendant July 31, 1939.

Shortly after the first order was filled in February, 1939, and prior to the placing of any of the subsequent orders it was found that the parts supplied by plaintiffs melted under certain operating conditions. Although the white brass metal used had proved satisfactory under normal conditions, it was not capable of withstanding the severe heat emitted from the exhaust. Nevertheless, defendant continued to order more parts and paid for them after they were delivered. It is not contended that plaintiffs had any knowledge of the temperature at exhaust, although defendant had acquired such knowledge through tests made by him. Plaintiffs' only representation was that the melting point of white brass is approximately 750 degrees Fahrenheit. This is borne out by the evidence and no controversy arises over this fact. The difficulty came about through the unexpected heat of the motor at exhaust under severe driving conditions, and that was a matter with which plaintiffs were not conversant, but of which defendant is presumed, under the evidence, to have had knowledge.

It is contended that between the time that Dunne first called on defendant and December 6, 1938, when the contract was signed, defendant explained the operation of his filter and advised plaintiffs that it would be subjected to an exhaust heat of around 400 degrees Fahrenheit. On hearing, defendant admitted knowing that the manifold temperatures sometimes rise to 1,300

that time making three of the parts and the complete filters were assembled at defendant's plant, February 11, 1939, defendant ordered an additional 1,000 sets, on March 9 another 1,000 were ordered, and June 28 of that year a final order for 3,000 sets was placed with plaintiffs. All these orders were filled and shipped, the last installment of several hundred sets being received by defendant July 31, 1939.

Shortly after the first order was filled in February, 1939, and prior to the placing of any of the subsequent orders it was found that the parts supplied by plaintiffs melted under certain operating conditions. Although the white brass metal used had proved satisfactory under normal conditions, it was not capable of withstanding the severe heat emitted from the exhaust, nevertheless, defendant continued to order more parts and paid for them after they were delivered. It is not contended that plaintiffs had any knowledge of the temperature at exhaust, although defendant had acquired such knowledge through tests made by its plaintiffs' only representation was that the melting point of white brass is approximately 750 degrees Fahrenheit. This is borne out by the evidence and no controversy arises over this fact. The difficulty came about through the unexpected heat of the motor at exhaust under severe driving conditions, and that was a matter with which plaintiffs were not conversant, but of which defendant is presumed, under the evidence, to have had knowledge.

It is contended that between the time that Burns first called on defendant and December 6, 1939, when the contract was signed, defendant explained the operation of his filter and advised plaintiffs that it would be subjected to an exhaust heat of around 400 degrees Fahrenheit. In hearing, defendant admitted knowing that the manifold temperatures sometimes rise to 1,300

degrees Fahrenheit, but this information was never conveyed to plaintiffs, and defendant never told them that he needed a metal which would be required to stand such heat. When the contract was signed, plaintiff Carl Roehri had no detailed information about the mechanism of the filter, and first learned how it operated after the second sample had been submitted. He testified that he then saw one of the filters installed.

As the result of the change from sand to die castings and the use of white brass metal, defendant received numerous complaints from customers, and it was then ascertained that the castings made by plaintiffs would not withstand the high temperatures generated under severe driving conditions. While it may well be true that defendant suffered considerable losses because of the change from aluminum to white brass, the question presented is whether plaintiffs should be held to account for the damages which resulted.

The balance due plaintiffs is not seriously disputed. The only issues presented to the court are whether plaintiffs expressly warranted the filter parts or whether, from the facts presented, a warranty is raised by implication of law. These issues were purely questions of fact which the court determined adversely to defendant. Although defendant discusses salient parts of the evidence, we find in his brief no point contending that the court's findings were contrary to the manifest weight of the evidence and we would, therefore, be justified in concluding that the findings ought not to be disturbed and that the judgment should be affirmed. However, from an examination of the record, we are satisfied that the evidence discloses no express warranties on the part of plaintiffs, and that the evidence does not give rise to a warranty implied by law.

degrees Fahrenheit, but this information was never conveyed to plaintiffs, and defendant never told them that he needed a casting which would be required to stand such heat. When the casting was shipped, plaintiff's only complaint was no detailed information about the mechanism of the filter, and that it was not to be operated after the second sample had been submitted. He testified that he then saw one of the filters installed.

As the result of the change from sand to the sludge and the use of white brass metal, defendant received numerous complaints from customers, and it was then ascertained that the castings made by plaintiffs could not withstand the high temperatures generated under a very driving condition. While it may well be true that defendant suffered some of his losses because of the change from aluminum to white brass, the question presented is whether plaintiffs should be held to account for the damages which resulted.

The balance due plaintiffs is not seriously disputed. The only issues presented to the court are whether plaintiffs warranted the filter parts or whether, from the facts presented, a warranty is raised by implication of law. These issues are purely questions of fact which the court determined adversely to defendant. Although defendant discloses a latent part of the evidence, we find in the first no point remaining that the court's findings were contrary to the weight of the evidence and we would, therefore, be justified in concluding that the findings ought not to be disturbed and that the defendant should be affirmed. However, from an examination of the record, we are satisfied that the evidence discloses no express warranties on the part of plaintiffs, and that the evidence does not give rise to a warranty implied by law.

1939, upon which defendant relies, provides: "12. Definition of express warranty.] Sec. 12. Any affirmation of fact or any promise by the seller relating to the goods is an express warranty if the natural tendency of such affirmation or promise is to induce the buyer to purchase the goods, and if the buyer purchases the goods relying thereon. No affirmation of the value of the goods, nor any statement purporting to be a statement of the seller's opinion only shall be construed as a warranty." As heretofore set forth, plaintiffs made no express representations or warranty that the parts made by them, according to defendant's specifications, would not melt at high temperatures. White brass metal was well known to the trade, and defendant was familiar with its heat-withstanding capacity. The principal statement of fact attributed by defendant to plaintiffs was that the melting point of this metal was approximately 750 degrees Fahrenheit, and that it was stronger than aluminum. While it may be that these statements induced defendant to enter into the contract with plaintiffs and that defendant relied on them, the statements were evidently true and, therefore, no breach of warranty can well be claimed. It is doubtful, however, whether defendant actually relied on any statements made by plaintiffs, because the latter were not familiar with the mechanism of the filter when the contract was signed. Carl Roehri was in the die casting business, and had no knowledge of exhaust temperatures nor did he make any representations of such knowledge to defendant. On the other hand, defendant, who had conducted experiments in connection with the manufacture of his filter, had considerable familiarity with the melting points of various metals, and knowledge of the temperatures to which his device would be subjected under driving conditions and, therefore, it is difficult to conceive that he placed reliance on any representations that he claims plaintiffs made. Defendant contends that he was advised

1939, upon which defendant relied, provided: "It is a representation of express warranty. [See, also, any affirmation of fact or any promise by the seller relating to the goods is an express warranty if the natural tendency of such affirmation or promise is to induce the buyer to purchase the goods, and if the buyer purchases the goods relying thereon. No affirmation of the value of the goods, nor any statement purporting to be a statement of the seller's opinion only shall be construed as a warranty." As heretofore set forth, plaintiffs made no express representations or warranty that the parts made by them, according to defendant's specifications, would not melt at high temperatures. With these facts well known to the trade, and defendant was familiar with its heat-treating capacity. The principal statement of fact attributed by defendant to plaintiffs was that the melting point of this metal was approximately 750 degrees Fahrenheit, and that it was stronger than aluminum. While it may be that these statements induced defendant to enter into the contract with plaintiffs and that defendant relied on them, the statements were admittedly true and, therefore, no breach of warranty can well be claimed. It is doubtful, however, whether defendant actually relied on any statements made by plaintiffs, because the latter were not familiar with the mechanism of the filter when the contract was signed. Carl Woodard was in the die casting business, and had no knowledge of exhaust temperatures nor did he make any representation of such knowledge to defendant. On the other hand, defendant, who had conducted experiments in connection with the manufacture of his filter, had considerable familiarity with the melting points of various metals, and knowledge of the temperatures to which his device could be subjected under driving conditions and, therefore, it is difficult to conceive that he placed reliance on any representation that he claims plaintiffs made. Defendant contends that he was advised

by plaintiffs to use this type of metal, but the record does not bear him out because he testified that he first became interested in white brass metal castings through his son, who had seen them at a metal show and told him about them. Moreover, several die casters had previously bid on castings and, according to the record, all the concerns bidding proposed to use the kind of metal which defendant had specified, namely, white brass. In view of these circumstances, we think the court properly found that there was no express warranty.

The contention that there was an implied warranty arises by virtue of subsection (1) of par. 15 of the statute (Ill. Rev. Stat. 1939, chap. 121-1/2), which provides: "(1) Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, and it appears that the buyer relies on the seller's skill or judgment (whether he be the grower or manufacturer or not), there is as [an] implied warranty that the goods shall be reasonably fit for such purpose." A finding that defendant had made known to plaintiffs the particular purpose for which these castings were required and that he relied on plaintiffs' skill or judgment, so as to raise an implied warranty that the goods shall be reasonably fit for such purpose, would not be warranted by the evidence. This oil filter was evidently composed of numerous parts, only three of which were made by plaintiffs, who had nothing to do with assembling them, and had never seen one installed until after the contract was signed. It was clearly incumbent on defendant to convince the court that he had made known to plaintiffs the particular purpose for which these castings were required. The evidence in this behalf is conflicting. Defendant contends that he explained to Carl Roehri how the machine operated; whereas, Roehri testified that he had never met defendant until after the contract was signed and that all he knew about the device was that it was an oil filter. The court would not have been justi-

by plaintiffs to as this type of metal, and the reason does not
bear him out because in 1939, that is, in 1939, he was interested
in white brass metal of which he had some, and had seen some
at a metal show and told the court that, however, several dis-
cussers had previously told on evidence was, according to the record,
all the concerns having proposed to use the kind of metal which
defendant had specified, namely, white brass. In view of these
circumstances, we think the court properly found that there was
no express warranty.

The contention that there was an implied warranty arises by
virtue of subsection (1) of par. 14 of the Statute (R.S.A. 1930, c. 141,
1939, chap. 121-1/2), which provides: "(1) Where the buyer, ex-
press or by implication, makes known to the seller the particular
purpose for which the goods are required, and it appears that the
seller relies on the seller's skill or judgment (whether or not the
buyer or manufacturer or user, as the case may be, is a dealer in the
goods) that the goods shall be reasonably fit for such purpose." It is
that that defendant made known to plaintiffs the particular
purpose for which these goods were required and that he relied
on plaintiffs' skill or judgment, so as to raise an implied warranty
that the goods shall be reasonably fit for such purpose, would not
be warranted by the evidence. But all this is immaterial compared
of numerous parts, many of which were made by plaintiffs, who
had nothing to do with assembling them, and who never saw one in-
stalled until after the defendant was shown. It was clearly in-
stalled on defendant's premises. The court said he had shown to
plaintiffs the particular purpose for which these goods were re-
quired. The evidence in this regard is undisputed. Defendant
contends that he explained to each plaintiff the nature of the
goods, that he stated that he was not a defendant's dealer
after the contract was signed and that he was known about the device
and that it was an old device. This court would not have been in-ter-

fied in finding from the evidence that defendant relied on plaintiffs' judgment as to the proper metal to be used, for he knew that Carl Rhoehri had no knowledge about the temperature of motors at exhaust and made no representation that he had such knowledge. Moreover, there was the admission of defendant that other die casters had bid for the work before Dunne visited defendant's plant, and the further admission that defendant advised plaintiffs that their competitors were all figuring on the use of white brass. As inventor of the device, defendant had tested motor temperatures and had considerably more information on the subject than plaintiffs could possibly have. He evidently convinced the court of his knowledge on the subject by testifying to the melting points of metals and, through his testimony, indicating that he had attempted to cut down the heat entering the filter by the use of various devices, without consulting anyone, and certainly not plaintiff. There is the further circumstance that the sample of the castings required was submitted to plaintiffs, who prepared a blueprint therefrom, which was in accordance with defendant's specifications and was subsequently approved by defendant, and the contract entered into between the parties provides that the parts should be made of white brass metal, with which all the parties, including the competing bidders, had some familiarity.

In making his decision at the close of all the evidence, the court considered it significant that, after the first set of castings were made, delivered, and found to be incapable of withstanding the heat when exposed to severe driving conditions, defendant did not demand an explanation from plaintiffs, and the trial judge specifically pointed out in his oral opinion that this metal was well known to the trade, "anybody could find out about it, it was not Rhoehri's invention, it was something that was in use for many years." Nevertheless, after the unsatisfactory result experienced with the first castings made by plaintiffs, defendant placed, and received, two

filed in making from the evidence that defendant relied on
plaintiffs' judgment as to the proper way to proceed, for he
knew that Carl Woodard had no knowledge about the temperature of
motors at exhaust and made no representation that he had such
knowledge. Moreover, there was the admission of defendant that
other die casters had hit for the work before James visited de-
fendant's plant, and the further admission that defendant advised
plaintiffs that their competitors were all figuring on the use of
white brass. A inventor of the device, defendant had tested
motor temperatures and had considerably more information on the
subject than plaintiffs could possibly have. He evidently con-
sidered the cost of his knowledge on the subject by testifying to
the melting points of metals and, through his testimony, indicating
that he had attempted to cut down the heat entering the filter by
the use of various devices, without consulting anyone, and certainly
not plaintiff. It is the further circumstance that the sample
of the castings required was submitted to plaintiff, who prepared
a blueprint therefrom, which was in accordance with the master's
specifications and was subsequently approved by defendant, and the
contract entered into between the parties provides that the parts
should be made of white brass metal, with which all the parties,
including the casting plant, had some familiarity.
In making his motion at the close of all the evidence, the
court considered it significant that, after the trial of castings
were made, delivered, and found to be incapable of withstanding the
heat when exposed to severe testing conditions, defendant did not
demand an explanation from plaintiff, and the trial judge sponta-
neously pointed out in his oral opinion that this metal was well known
to the trade, "anybody could find out about it, it was not Rosin's
invention, it was something that was in use for many years." There-
fore, after the unsatisfactory results experienced with the first
castings made by plaintiff, defendant placed, and received, two

or three more orders, and later stated in his letter to Roehri of June 13, 1939, that "somehow I feel that I am not entirely to blame," indicating that he certainly did not hold plaintiffs responsible, or not entirely so, for the substitution of white brass metal for aluminum.

We find no convincing reason for reversing the judgment of the Municipal court and it is, therefore, affirmed.

JUDGMENT AFFIRMED.

Scanlan, P. J., and Sullivan, J., concur.

or three more orders, and later stated in his letter to the
of June 13, 1939, that "somehow I feel that I am not entirely to
blame," indicating that he certainly did not hold plaintiffs
responsible, or not entirely so, for the assassination of White
press retail for aluminum.

He find no convincing reason for reversing the judgment
of the Municipal Court and it is, therefore, affirmed.
JUDGMENT AFFIRMED.

Seaman, P. J., and Sullivan, J., concur.

41708

GOLDIE BUEHLER,

Appellee,

v.

ALBERT C. BUEHLER,
Appellant.

APPEAL FROM SUPERIOR COURT,
COOK COUNTY.

313 I.A. 265

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

This is the second of three appeals prosecuted by the defendant Albert C. Buehler from orders arising out of a decree entered in favor of Goldie Buehler, plaintiff herein, October 20, 1937. The decree granted plaintiff a divorce on the ground of cruelty, fixed her alimony, support for two of the children whose custody was awarded to her, allowed her fees for her solicitors and, among other things, awarded her and defendant equal interests in the residence at 151 Abingdon avenue, Kenilworth, Illinois, with the provision that the premises be sold as soon as convenient. The Continental Illinois National Bank was appointed appraiser to determine the value of the residence, and the court retained jurisdiction for the purpose of carrying out the sale. The bank declined to act as appraiser, and by agreement the Chicago Real Estate Board Appraisal Committee was appointed and placed a value of \$25,000 on the premises. Plaintiff was unable to sell the property at the appraised figure and thereupon defendant offered to purchase her interest less certain advancements made by him on account of interest, taxes and principal payments. There was a mortgage of \$15,000 on the property, and upon the basis of the \$25,000 valuation, defendant computed that the parties had an equity, after deducting the mortgage, interest and principal payments, amounting to \$8,247.35; and after subtracting what he contended was Mrs. Buehler's share of the interest, taxes and principal payments,

41708

GOLDIE BUEHLER,

Appellee,

v.

ALBERT C. BUEHLER,
Appellant.

IN THE CIRCUIT COURT OF

COOK COUNTY,

8181A-202

MR. JUSTICE FRANK D. BUEHLER, JR. CLERK OF THE COURT.

This is the second of three appeals presented by the

defendant Albert C. Buehler from orders entered out on a decree

entered in favor of Goldie Buehler, plaintiff herein, October

20, 1937. The decree granted plaintiff a divorce on the ground

of cruelty, fixed her alimony, support for two of the children

whose custody was awarded to her, allowed her fees for her

solicitors and, among other things, awarded her and defendant

equal interests in the residence at 151 Arlington Avenue, Kenil-

worth, Illinois, with the provision that the houses be sold

as soon as convenient. The Continental Illinois National Bank

was appointed appraiser to determine the value of the residence,

and the court retained jurisdiction for the purpose of carrying

out the sale. The bank declined to act as appraiser, and by

agreement the Chicago Real Estate Board Appraisal Committee

was appointed and fixed a value of \$25,000 on the premises.

Plaintiff was unable to sell the property at the purchase

figure and thereupon defendant offered to purchase her interest

less certain advancements made by him on account of interest,

taxes and principal payments. There was a mortgage of \$15,000

on the property, and upon the basis of the \$25,000 valuation,

defendant computed that the parties had an equity, after deducting

the mortgage, interest and principal payments, amounting to

\$8,247.32; and after subtracting what he contended was his

Buehler's share of the interest, taxes and principal payments,

he computed her equity in the residence at \$535.34, which he offered to pay her. She declined the offer, contending that his interpretation of the decree resulted in improperly charging her with payments which materially affected her equity in the property to the extent of several hundred dollars. Defendant thereupon filed a petition in the Superior court asking for a construction of the decree with respect to the liabilities of the parties to pay taxes, interest and other charges, pending the sale. To this petition plaintiff filed her answer. Upon hearing of the petition and answer, the court entered an order October 14, 1940, construing the decree, from which defendant appeals.

After awarding plaintiff and defendant an equal interest in the residence at Kenilworth, the original decree contained the following further provisions, which are the subject of controversy between the parties:

"It is further ordered, adjudged and decreed that all past due interest on encumbrances and general taxes, and all accrued general taxes and interest on encumbrances which have become due on such real estate hereinbefore described shall be charged against the share of the defendant and shall be paid by him, and he, the defendant, shall continue to pay such interest on the encumbrances and general taxes as they shall hereafter become due; such payments on principal which accrued from and after May 31, 1937, whether or not paid by the defendant, shall be charged one-half to the plaintiff and one-half to the defendant upon any proceeds received from the sale of the premises.

"It is further ordered, adjudged and decreed that all taxes which shall hereafter become due shall be paid one-half by the plaintiff and one-half by the defendant, the plaintiff's share to be charged against any money coming to her from the proceeds of the sale of these premises.

"It is further ordered, adjudged and decreed that all interest which shall hereafter become due on the encumbrances shall be charged one-half to the plaintiff and one-half to the defendant, the plaintiff's share to be charged against any proceeds she may receive from the sale of the equity."

Since the entry of the original decree October 20, 1937, plaintiff has occupied the residence at Kenilworth and defendant has, during that period, made payments on account of the principal

he computed her equity in the residence at \$75,000, which he offered to pay her. She declined the offer, contending that his interpretation of the decree resulted in improperly charging her with payments which materially affected her equity in the property to the extent of several hundred dollars. Defendant thereon filed a petition in the superior court asking for construction of the decree with respect to the liabilities of the parties to pay taxes, interest and other charges, pending the sale. To this petition plaintiff filed her answer, upon hearing of the petition and answer, the court entered an order October 14, 1937, constraining the parties, from which defendant appeals.

After granting plaintiff's petition an appeal interest in the residence at defendant's, the original decree contained the following further provisions, which are the subject of controversy between the parties:

"It is further ordered, assigned and decreed that all past due interest on encumbrances and general taxes, and all accrued general taxes and interest on encumbrances which have become due on such real estate, shall be charged against the share of the defendant and shall be paid by him, and he, the defendant, shall continue to pay such interest on the encumbrances and general taxes as they shall hereafter become due; such payments on principal which accrued from and after May 31, 1937, whether or not paid by the defendant, shall be charged one-half to the plaintiff, and one-half to the defendant upon any proceeds received from the sale of the premises.

"It is further ordered, assigned and decreed that all taxes which shall hereafter accrue shall be paid one-half by the plaintiff and one-half by the defendant, the plaintiff's share to be charged against any proceeds received from the sale of the premises.

"It is further ordered, assigned and decreed that all interest which shall hereafter accrue on the encumbrances shall be charged one-half to the plaintiff and one-half to the defendant, the plaintiff's share to be charged against any proceeds received from the sale of the property."

Since the entry of the original decree October 30, 1937, plaintiff has occupied the residence at defendant's and defendant has, during that period, made payments on account of the principal

indebtedness, taxes and interest on the mortgage. He sought by his petition to have the court find that under the foregoing provisions of the decree plaintiff should be charged one-half of the 1936 taxes, which amounted to \$440.28; one-half of the 1937 taxes, which amounted to \$433.56; one-half of the interest payment on the mortgage due June 24, 1937, which amounted to \$510; and one-half of another interest item of \$480, which was paid by defendant December 24, 1937, after entry of the decree, but which accrued before October 20, 1937.

However, the court found adversely to defendant's contention and interpreted the liability of the parties under the provisions of the decree as follows:

"(a) That the general real estate taxes for the year 1936 and prior years should be charged entirely against the defendant.

"(b) That the general real estate taxes for the year 1937, amounting to \$432.56 should be charged \$392.91 thereof against defendant, and \$36.95 thereof against plaintiff's share of the proceeds of the sale of said real estate, when sold.

"(c) That the general real estate taxes for the year 1938 and subsequent years should be divided equally between the parties and the portion charged against plaintiff be deducted from her share of the proceeds of the sale of said real estate, when sold.

"(d) That the interest on the mortgage encumbrance against said real estate for the six months' period beginning June 25, 1937, and ending December 24, 1937, which became due and payable December 24, 1937, amounting to \$480, should be charged \$394.58 against defendant and \$85.42 against plaintiff's share of the proceeds of the sale of said real estate, when sold;

"(e) That the interest on said mortgage encumbrance which became due and payable June 24, 1937, and theretofore be charged entirely against defendant;

"(f) That the interest on said mortgage encumbrance which became due and payable subsequent to December 24, 1937, should be divided equally between the parties and the portion charged against plaintiff deducted from her share of the proceeds of the sale of said real estate, when sold."

We think there can be no reasonable doubt that under the provisions of the decree the general real estate taxes for the year 1936 and prior years should be charged entirely against defendant, nor that the interest on the mortgage which became

indebtedness, taxes and interest on the mortgage. He sought by his petition to have the court find that under the foregoing provisions of the decree plaintiff should be charged one-half of the 1936 taxes, which amounted to \$440.85; one-half of the 1937 taxes, which amounted to \$433.56; one-half of the interest payment on the mortgage due June 24, 1937, which amounted to \$110; and one-half of another interest item of \$100, which was paid by defendant December 24, 1937, after entry of the decree, but which accrued before October 20, 1937.

However, the court found adversely to defendant's contention and interpreted the liability of the parties under the provisions of the decree as follows:

"(a) That the general real estate taxes for the year 1936 and prior years should be charged entirely against the defendant.

"(b) That the general real estate taxes for the year 1937, amounting to \$433.56 should be charged 100% against defendant, and 50% thereof against plaintiff's share of the proceeds of the sale of said real estate, when sold.

"(c) That the general real estate taxes for the year 1938 and subsequent years should be divided equally between the parties and the portion charged against plaintiff be charged 100% against defendant, and 50% thereof against plaintiff's share of the proceeds of the sale of said real estate, when sold.

"(d) That the interest on the mortgage and interest on said real estate for the six months' period beginning June 25, 1937, and ending December 24, 1937, which amounts to \$110, and the interest on the mortgage due December 24, 1937, amounting to \$100, should be charged 100% against defendant and 50% thereof against plaintiff's share of the proceeds of the sale of said real estate, when sold.

"(e) That the interest on said mortgage and interest on said real estate for the period June 24, 1937, and December 24, 1937, which amounts to \$110, and the interest on the mortgage due December 24, 1937, amounting to \$100, should be charged entirely against defendant.

"(f) That the interest on said mortgage and interest on said real estate for the period December 24, 1937, and subsequent years should be divided equally between the parties and the portion charged against plaintiff be charged 100% against defendant, and 50% thereof against plaintiff's share of the proceeds of the sale of said real estate, when sold."

We think there can be no reasonable doubt that under the provisions of the decree the general real estate taxes for the year 1936 and prior years should be charged entirely against defendant, nor that the interest on the mortgage which became

due and payable June 24, 1937, should also be charged to his account. Both of these items became due and were payable before October 20, 1937, when the decree was entered, and under the provision "that all past due interest on encumbrances and general taxes, and all accrued general taxes and interest on encumbrances which have become due on such real estate hereinbefore described shall be charged against the share of defendant," Mr. Buehler was clearly liable for the 1936 taxes and for all interest charges which became due prior to the entry of the decree.

Although when the petition was filed defendant sought to charge plaintiff with one-half of the taxes for the year 1936, he now apparently concedes his liability for the first installment of the 1936 taxes; but he argues that plaintiff should be held liable to pay one-half of the subsequent installments for 1936 and one-half of all the 1937 taxes. This contention is predicated upon various provisions of the Revenue Act of Illinois (pars. 165, 287, 331, 332 and 150 of ch. 120, Ill. Rev. Stat. 1935 (Smith-Hurd edition) and is the subject of an extended argument in defendant's brief predicated upon distinctions between the legal meaning of the terms "past due," "accrued," and "as they shall hereafter become due," as applied to both taxes and interest on the mortgage indebtedness. No doubt the disputed provisions of the decree are somewhat confusing because of the interchange of the terms "due," "accrued," and "to become due," but under the provisions of the Revenue Act at the time of the entry of the decree the county collector was required to proceed to collect the taxes upon receiving the tax books and the county clerk was required to deliver the books on or before December 31 of the year for which the taxes were assessed (pars. 143 and 331). This rendered the 1936 taxes due not later than January 1, 1937. When the decree was entered it purported to fix the rights of the parties as of October 20, 1937, the date of the entry

due and payable June 30, 1937, should also be subject to this assessment. Both of these things become due and payable before January 1, 1937, when the above was enacted, and under the provision "that all past due interest on mortgages and general taxes, and all accrued general taxes and interest on mortgages which have become due on such real estate hereinafter described shall be charged and paid at the time of redemption," Mr. Bowman was clearly liable for the 1936 taxes and for all interest charged with respect to the same to the entry of his decree.

Although when the decision was first rendered relating to charge plaintiff with one-half of the taxes for the year 1936, he now apparently concedes his liability for the first installment of the 1936 taxes; but he argues that plaintiff should be held liable to pay one-half of the subsequent installments for 1936 and one-half of all the 1937 taxes. This contention is predicated upon various provisions of the Revenue Act of 1936 (para. 187, 287, 331, 332 and 170 of 26, 183, 211, 207, 193, 195, 201-202, 203-204) and is the subject of an extended argument in defendant's

brief predicated upon distinctions between the legal meaning of the terms "past due," "accrued," and "taxes which have become due," as applied to both taxes and interest on the mortgage indebtedness. He doubts the repeated application of the words and somewhat confusing use of the language of the terms "due," "accrued," and "to become due," and under the provisions of the Revenue Act at the time of the entry of his decree the county collector was required to provide for payment of taxes upon receiving the tax books and the county clerk was required to deliver the books on or before December 31 of the year for which the taxes were assessed (para. 145 and 211). This rendered the 1936 taxes due not later than January 1, 1937. When the above was enacted it purported to fix the rights of the parties as of October 30, 1936, the date of the entry

of the decree. Alimony, support of the children, solicitors' fees and other items were presumably to be computed and become due as of that date, and the court in awarding the parties equal interest in the family residence, with the provisions as to their respective liabilities for the payment of taxes and interest, pending the sale of the property, had no such refinements in mind as defendant now makes with respect to the meaning of words incorporated in the decree. It was manifestly the intention of the court that defendant should ~~not~~ pay all charges which were "due" or had "accrued" up to the time the decree was entered, and that a fair apportionment of the tax and interest liabilities should be made thereafter. This applied not only to 1937 taxes but to interest charges on the encumbrances as well. Defendant's counsel argue "that it is not the duty of a reviewing court to ascertain what a trial court meant, but rather to determine what was said;" nevertheless, they devote several pages of their brief to considerations they say the chancellor had in mind, as indicative of his intentions. We think the prorating of the taxes and interest charges subsequent to the entry of the decree was manifestly fair and in accordance with the language of the instrument, and that all charges that became due or accrued prior to the entry of the decree were expressly decreed to be the liability of defendant.

The order appealed from is accordingly affirmed.

ORDER AFFIRMED.

Scanlan, P. J., and Sullivan, J., concur.

of the decree. Alimony, support of the children, collection of taxes and other items were presented to be completed and before the date of that date, and the court in awarding the alimony and interest in the family residence, with the provisions as to their respective liabilities for the payment of taxes and interest, containing the same of the property, had no such refinements in mind as mentioned now makes with respect to the meaning of words incorporated in the decree. It was manifestly the intention of the court that defendant should pay all charges which were "due" or had "accrued" up to the time the decree was entered, and that a fair apportionment of the tax and interest liabilities should be made thereafter. This applied not only to 1937 taxes but to interest charges on the advances as well. Defendant's counsel says "that it is not the duty of a reviewing court to ascertain what a trial court meant, but rather to determine what was said;" nevertheless, they have several pages of their brief to considerations they say the chancellor had in mind, as indicative of his intentions. We think the provisions of the taxes and interest charges subsequent to the entry of the decree was manifestly fair and in accordance with the language of the instrument, and that all charges thereafter due or accrued prior to the entry of the decree were expressly decreed to be the liability of defendant.

The order appealed from is accordingly affirmed.

ORDER AFFIRMED.

Scanlan, J. J., and Sullivan, J., concur.

41709

GOLDIE BUEHLER,
Appellee,

v.

ALBERT C. BUEHLER,
Appellant.

APPEAL FROM SUPERIOR COURT,

COOK COUNTY.

3131.A. 265²

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

This is the third appeal prosecuted by defendant, Albert C. Buehler, from orders arising out of a decree entered in favor of Goldie Buehler, plaintiff herein, on October 20, 1937. The second or preceding appeal (No. 41708) was taken from an order of the Superior court interpreting certain provisions of the decree with respect to the liability of the parties to pay taxes and interest on the family residence, a one-half interest to which had been awarded to each of the parties under the original decree. Defendant there sought to charge Mrs. Buehler with one-half of the tax and interest charges paid by him which became due or accrued before the decree was entered, and he filed a petition in the Superior court seeking a construction of the decree in conformity with his views. Plaintiff was obliged to employ counsel, answer the petition and participate in a hearing before the court resulting in an order adverse to defendant's claim, which is the subject matter of the appeal in cause No. 41708 (opinion filed concurrently with this case). Pending the hearing plaintiff presented a petition to the chancellor asking for an order on defendant to pay her as and for her attorneys' fees for the services necessarily required to defend the petition seeking a construction of the decree, and was awarded the sum of \$250. The amount of the fees allowed is not challenged, but defendant asserts that there is no statutory authority by which a court may require the husband to pay solicitors' fees to his wife for

11709

ALBERT C. SCHLIER, Plaintiff.

v.

ALBERT C. SCHLIER, Defendant.

APPEAL FROM SUPERIOR COURT,

CLATSOP COUNTY.

3111A.285

MR. JUSTICE PRING & LIVINGSTON OF THE COURT.

This is the third appeal presented by defendant,

Albert C. Schlief, from orders existing out of a decree

entered in favor of Goldie Schlief, plaintiff herein, on

October 20, 1937. The second or preceding appeal (No. 11708)

was taken from an order of the superior court interpreting

certain provisions of the decree with respect to the liability

of the parties to pay taxes and interest on the family real-

estate, a one-half interest in which had been awarded to each

of the parties under the original decree. Defendant there

sought to change Mrs. Schlief with one-half of the tax and

interest charges paid by him which became due or accrued

before the decree was entered, and he filed a petition in the

superior court seeking a reconsideration of the decree in con-

formity with his views. Plaintiff was obliged to reply formally,

answer the petition and participate in a hearing before the court

resulting in an order adverse to defendant's claim, which is the

subject matter of the appeal in case No. 11709 (petition filed

concurrently with this case). Pending the hearing, plaintiff

presented a petition to the chancellor asking for an order on

defendant to pay her as and for her attorneys' fees for the

services necessarily rendered to defend the petition seeking

a reconsideration of the decree, and was awarded the sum of \$250.

The amount of the fees allowed is not challenged, but defendant

asserts that there is no statutory authority by which a court may

require the husband to pay attorneys' fees to his wife for

matters touching their property after a decree of divorce has been entered.

It may be conceded, of course, that courts have no powers to award solicitors' fees or to require a husband to pay his wife's solicitors' fees except where that authority is given by statute. There is authority in Illinois for awarding a divorced wife attorneys' fees necessarily incurred in defending against applications on the part of her husband for the reduction of alimony. In Stillman v. Stillman, 99 Ill. 196, the court had before it an order of the Circuit court discontinuing the wife's alimony upon her remarriage to another man, except the nominal amount of one dollar a year, but awarding the divorced wife attorneys' fees for services in resisting the application for the reduction of alimony. The Supreme court affirmed the order of the Circuit court with respect to the allowance of attorneys' fees in resisting the application, and so far as we have been able to ascertain this decision has been generally followed. Slezak v. Slezak, 293 Ill. App. 489; Thomas v. Thomas, 233 Ill. App. 488.

It is argued, however, that the construction of the decree for which the services were allowed had no application to the reduction of alimony. In this connection our attention is called to the order from which this appeal is taken, which recites that the matter was heard on evidence and the arguments of counsel, pursuant to which the court found: "1. That the defendant filed a petition on August 8, 1940, which petition could affect the plaintiff's award of alimony. 2. That the plaintiff employed an attorney to represent her in defense of her rights, which could have been affected by the said petition. 3. That the said attorney rendered valuable and necessary services." In invoking the court's jurisdiction to construe certain provisions of the decree in cause No. 41708, defendant, in his statement

maternal household property which is subject of the order has been entered.

It may be observed, of course, that such a decree as above

to award alimony, first on to require a husband to pay the wife's alimony, then secondly that alimony is given by statute. There is authority in Illinois for awarding a divorced wife attorneys' fees necessarily incurred in her own defense

applications on the part of her husband for the reduction of alimony. In Illinois v. Williams, 99 Ill. 195, the court has before it an order of the Circuit Court awarding the wife alimony upon her marriage to another man, except the nominal

amount of one dollar a year, but denying the divorced wife attorneys' fees for services in resisting the application for the reduction of alimony. The Supreme Court affirmed the order of the Circuit Court with respect to the allowance of attorneys' fees in resisting the application, and so far as we have been able to ascertain this decision has been generally followed. Illinois v. Williams, 99 Ill. 195, 409; Illinois v. Williams, 99 Ill. 195, 409.

It is argued, however, that the construction of the decree for which the services were allowed and the application for the reduction of alimony. In this connection the question is raised to the order from which this award is taken, which section last

the matter was heard on evidence and the question of recovery, pursuant to which the court found: "1. That the defendant filed a petition on August 8, 1910, which petition could affect the plaintiff's award of alimony. 2. That the plaintiff employed an attorney to represent her in defense of her rights, which

could have been effected by the said petition. 3. That the said attorney rendered valuable and necessary services. In involving the court's jurisdiction in non-suit certain provisions of the decree in case No. 1178, defendant, in his statement

attached to the petition, asks credit against plaintiff for a broker's commission amounting to \$1,250, one-half of which was to be charged against plaintiff, one-half of the first installment of general taxes due August 1, 1937, amounting to \$110.07, and one-half of the interest payment on the mortgage due June 24, 1937, amounting to \$255. These items aggregated approximately \$1,000 for which defendant sought to render plaintiff liable. In the various pleadings filed in these three appeals, supported by competent evidence, plaintiff established the fact that she had no means or income other than that derived from the decree which awarded her \$175 a month as alimony, and that she was unable to retain and pay counsel for defending the numerous petitions for the ascertainment and enforcement of her rights under the decree; and manifestly she was obliged in this proceeding to defend the petition and relieve herself from the charge of some \$1,000 which defendant sought to impose upon her by reason of his interpretation of the decree. A reduction of her interest in the real estate to the extent of \$1,000 would have materially affected her award by the decree, whether it be designated as alimony or the settlement of property rights; it was something that the court gave her as part of the equitable relief which she obtained along with the divorce. The three appeals, in which opinions are herewith concurrently filed, were brought here by defendant from orders entered in the same case, and if Mrs. Buehler were required to defend these orders at her own expense out of the meager allowance made her, it is well conceivable that she might be rendered helpless to protect her interest under the decree. Under the authorities cited we are of opinion that she is entitled to be reimbursed for her reasonable solicitors' fees in defending these orders.

Moreover, the order of the court from which this appeal is prosecuted found that defendant filed a petition which "could

attached to the petition, asks credit against liability for a broker's commission amounting to \$1,250, on-half of which she is charged against plaintiff, on-half of the same amounting to \$1,250, amounting to \$1,250, and one-half of the interest payment on the mortgage due June 24, 1937, amounting to \$525. These items aggregated approximately \$1,000 for which defendant sought to render plaintiff liable. In the various pleadings filed in these three appeals, supported by competent evidence, plaintiff established the fact that she had no means or income other than that derived from the decedent which awarded her \$175 a month as alimony, and that she was unable to retain and pay counsel for defending the numerous petitions for the ascertainment and enforcement of her rights under the decree; and manifestly she was obliged in this proceeding to defend the petition and relieve herself from the charge of some \$1,000 which defendant sought to impose upon her by reason of his negligence of the decree. A retention of her interest in the real estate to the extent of \$1,000 could have been easily effected her award by the decree, whether it be designated as alimony or the settlement of property rights; it was something that the court gave her as part of the equitable relief which she obtained along with the divorce. The three appeals, in each opinion and herewith concurred in, were brought here by defendant from orders entered in the same cases, and it was, therefore, necessary to defend these orders at her own expense out of the money allowance made her, it is self-evident that she might be rendered helpless to protect her interest under the decree. Under the authorities cited on one of which she is entitled to be reimbursed for her reasonable attorney's fees in defending these orders.

Moreover, the effect of the court from which this appeal is presented found that defendant filed a petition which could

affect the plaintiff's award of alimony," and that she employed counsel to represent her in defense of her rights "which could have been affected by the said petition." Since there is in this record no certificate of evidence or report of proceedings, the findings of the court must be taken as conclusive. David v. David, 359 Ill. 285; Renfrow v. Kramer, 341 Ill. 398. Plaintiff's petition for the allowance of fees, and upon which the order herein was entered, was filed while defendant's petition for interpretation of the decree in cause No. 41708 was pending, and plaintiff's answer in that proceeding likewise asked for the allowance of counsel fees.

We think the order of the Superior court was properly entered and it is therefore affirmed.

ORDER AFFIRMED.

Scanlan, F. J., and Sullivan, J., concur.

affect the Plaintiff's award ofimony," and that the employed counsel to represent her in defense of her rights "which could have been affected by the said petition." Since there is in

this record no certificate of evidence or report of proceedings, the findings of the court must be taken as conclusive. David

v. David, 379 Ill. 285; Wentworth v. Wentworth, 341 Ill. 398. Plaintiff

Plaintiff's petition for the allowance of fees, and upon which the order herein was entered, was filed with defendant's petition for intervention of the decree in cause No. 41908 was pending, and Plaintiff's answer in that proceeding likewise asked for the allowance of counsel fees.

We think the order of the superior court was properly entered and it is therefore affirmed.

ORDER AFFIRMED.

Scamman, J., and Sullivan, J., concur.

41847

BESSIE SIMON,
Appellant,

v.

PAULA BALASIC and
ALFRED BALASIC,
Appellees.

27 85
APPEAL FROM MUNICIPAL

COURT OF CHICAGO.

313 I.A. 266¹

MR. JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

On October 29, 1940, plaintiff, Bessie Simon, procured a default judgment for \$424.60, which included a finding of malice, against the defendants, Alfred Balasic and Paula Balasic, for the alleged conversion by said defendants of certain personal property claimed to have been owned by plaintiff. The first knowledge that defendants had of the entry of the judgment was when execution issued pursuant thereto was served upon them January 7, 1941. On January 9, 1941, defendants filed their sworn petition in the nature of a writ of error coram nobis to vacate the judgment. On March 19, 1941, after denying plaintiff's motion to strike defendants' petition to vacate, the trial court entered an order vacating the default judgment of October 29, 1940, and setting the case for trial. It is from this order that plaintiff appeals.

Defendants filed an Amended Defense, which set forth a meritorious defense to plaintiff's complaint, and also a counterclaim. As heretofore shown the default judgment was entered against defendants October 29, 1940, and they were first apprised of its entry on January 7, 1941, when they were served with execution.

Defendants' sworn petition, filed January 9, 1941, to vacate the judgment was as follows:

"Now comes Sid Mogul and represents unto the Court as follows:

41847

BESSIE SIMON,
Plaintiff,
v.
PAUL BALASIC and
ALBERT BALASIC,
Defendants.

COURT OF CHANCERY
CITY OF CHICAGO

313 I.A. 386

MR. JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

On October 29, 1940, plaintiff, Bessie Simon, presented a default judgment for \$424.00, which included a finding of malice, against the defendants, Albert Balasic and Paul Balasic, for the alleged conversion by said defendants of certain personal property claimed to have been owned by plaintiff. The first move made by the defendants was an entry of the judgment was when execution issued thereon was served upon them January 7, 1941. On January 7, 1941, defendants filed their sworn petition in the nature of a writ of error coram vobis to vacate the judgment. On March 19, 1941, after denying plaintiff's motion to strike defendants' petition to vacate, the trial court entered an order vacating the default judgment of October 29, 1940, and setting the case for trial. It is from this order that plaintiff appeals.

Defendants filed an amended defense, which set forth a meritorious defense to plaintiff's complaint, and also a counterclaim. As heretofore shown the default judgment was entered against defendants October 29, 1940, and they were first apprised of its entry on January 7, 1941, when they were served with execution.

Defendants' sworn petition, filed January 7, 1941, to

vacate the judgment was as follows:

"Now comes the said defendant and represents unto the court as

follows:

"1. That he is an attorney at law, duly licensed to practice in the State of Illinois and is associated with the firm of Max M. & Samuel Grossman, who are the attorneys of record for the defendants in this cause.

"2. That he is familiar with all of the facts pertaining to this matter and was active in representing the defendants herein.

"3. That from time to time he appeared on behalf of the defendants when the cause was called for trial and was at all times ready to proceed with the trial, but at all such times the plaintiff, by her attorney, requested a continuance.

"4. That on July 12, 1940, the matter came up for trial and was again continued to July 23, 1940.

"5. That again on July 23, 1940 the petitioner was informed by the Clerk of the Court in Room 902, City Hall, Chicago, Illinois, that July 12, 1940 was the last day of court before the commencement of the vacation schedule and that all matters on the call for July 12, 1940 would be continued and that since there was no court on July 23, 1940, any matters on the call for said date would be continued without date.

"6. The petitioner was further informed by the Clerk that if this cause were to come up again for trial it would be necessary for counsel to serve notice on the other to have it set down for trial on a day certain.

"7. That on January 7, 1941 at 3 P. M. this petitioner was informed that an ex parte judgment had been rendered against the defendants on October 29, 1940 for the sum of Four Hundred Twenty Four and 60/100 Dollars (\$424.60) and Seven (\$7.00) costs.

"8. That on January 7, 1941, very shortly after 3 P. M. was the first time that this Petitioner or either of the defendants had any notice or knowledge that the said judgment had been rendered against the defendants.

-2-

"1. That he is an attorney at law, duly licensed to practice in the State of Illinois and is associated with the firm of M. & Samuel Grossman, who are the attorneys of record for the defendants in this cause.

"2. That he is familiar with all of the facts pertaining to this matter and was active in representing the defendants herein.

"3. That from time to time he appeared on behalf of the defendants when the cause was called for trial and was at all times ready to proceed with the trial, but on all such times the plaintiff, by her attorney, requested a continuance.

"4. That on July 12, 1940, the matter came up for trial and was again continued to July 23, 1940.

"5. That again on July 23, 1940 the petitioner was informed by the Clerk of the Court in Room 902, City Hall, Chicago, Illinois, that July 12, 1940 was the last day of court before the commencement of the vacation schedule and that all matters on the call for July 12, 1940 would be continued and that since there was no court on July 23, 1940, any matters on the call for said date would be continued without date.

"6. The petitioner was further informed by the Clerk that if this cause were to come up again for trial it would be necessary for counsel to serve notice on the other to have it set down for trial on a day certain.

"7. That on January 7, 1941 at 3 P. M. this petitioner was informed that an ex parte judgment had been rendered against the defendants on October 7, 1940 for the sum of four hundred Twenty Four and 60/100 Dollars (\$424.60) and seven (\$7.00) cents.

"8. That on January 7, 1941, very shortly after 3 P. M. was the first time that this petitioner or either of the defendants had any notice or knowledge that the said judgment had been rendered against the defendants.

"9. That this cause was not properly on the trial call for October 29, 1940; that if same was placed thereon, it was done without notice to counsel for the defendants and such defendants and their counsel never had any notice or knowledge of the hearing held on October 29, 1940; that the file in this cause does not contain an order setting said cause for trial on October 29, 1940, nor does the file contain any notice or memorandum of such notice to the defendants, or their counsel, that said cause would be set down for hearing on October 29, 1940.

"10. That the defendants have a good and meritorious defense to all of the plaintiff's statement of claim, as will more fully appear from the Amended Defense previously filed herein, and as a matter of fact, said defendants have a counterclaim against the plaintiff, which is still pending and undisposed of.

"11. That said ex parte judgment was procured by fraud as evidenced by the fact that said plaintiff waited more than sixty (60) days to serve an execution upon the defendants, who are in business in Chicago and have been located at the same address for many years, all of which was well known to the plaintiff and her counsel, and said plaintiff did not at any time communicate with the petitioner or counsel for the defendants, nor notify the defendants in any manner that such a judgment had been rendered, nor did counsel for said plaintiff communicate with the petitioner, the attorneys for defendants, or the defendants themselves, that he would have the matter set down for hearing on October 29, 1940.

"Wherefore your petitioner prays that said ex parte judgment be vacated and set aside for fraud committed upon the court, the defendants, and their counsel, and that said cause be set down for hearing on the merits at an early date to be fixed by the court and that this court grant such other relief as it may deem just."

Plaintiff's motion to strike defendants' petition to vacate

"9. That this case was not properly on the trial roll for October 29, 1940; that it was placed on the roll, it was done without notice to counsel for the defendants and their attorneys and their counsel never had any notice on the date of the hearing held on October 29, 1940; that the trial in this case was not contain an order setting said case for trial on October 29, 1940, nor does the file contain any notice or communication of such notice to the defendants, or their counsel, that said case would be set down for hearing on October 29, 1940.

"10. That the defendants have a good and legal defense to all of the plaintiff's statement of claim, as will more fully appear from the amended answer previously filed herein, and as a matter of fact, said defendants have a counterclaim against the plaintiff, which is still pending and undisposed of.

"11. That said ex parte judgment was pronounced by the court as demanded by the fact that said plaintiff waited more than sixty (60) days to serve an execution upon the defendants, who are in business in Chicago and have been located at the same address for many years, all of which was well known to the plaintiff and her counsel, and said plaintiff did not at any time communicate with the petitioner or counsel for the defendants, nor notify the defendants in any manner that such a judgment had been rendered, nor did counsel for said plaintiff communicate with the petitioner, the attorneys for defendant, or the defendants themselves, that he would have the matter set down for hearing on October 29, 1940.

"Wherefore your petitioner prays that said ex parte judgment be vacated and set aside for fraud committed upon the court, the defendants, and their counsel, and that said case be set down for hearing on the merits at an early date to be fixed by the court and that this court grant such other relief as it may deem just.

Plaintiff's motion to strike defendants' petition to vacate

was supported by the following affidavit of her attorney:

"Jacob Levy, being first duly sworn on oath deposes and says that he is the attorney for plaintiff in the above entitled cause.

"Affiant further states that when the said cause appeared on the trial call of July 12, 1940, the case was continued to July 23, 1940; that on said date, in Room 902, where cases of this nature and character are heard, the court had adjourned for the summer vacation.

"Affiant further states that shortly after the court had convened for the September term, affiant made inquiries of the Clerk in Room 902 and was advised that the cause in question had been set for October 29, 1940. Affiant further states that the said case appeared in the Daily Municipal Court Record of October 28, 1940, for October 29, 1940, a copy of which Municipal Court Record is hereto attached and marked Plaintiff's Exhibit 'B'.

"Affiant further states that he appeared with his client and witnesses in Room 902 on October 29, 1940, and that the cause was called for hearing before His Honor, Judge Green, in Room 902; that the evidence was taken in said cause and that Judge Green found for the plaintiff and entered judgment in favor of the plaintiff and against the defendant.*

Attached to and made a part of Attorney Levy's affidavit was a copy of the Municipal Court Record of October 28, 1940. The Municipal Court Record of said date showed various trial calls for the next day, October 29, 1940, including a call entitled "Room 902 City Hall - Judge Eugene McGarry, 9:30 A. M. Non-Jury Tort Cases." The instant case was on said call and Judge Green presided in that branch of the court on October 29, 1940, instead of Judge McGarry.

In another column of the Municipal Record of October 28, 1940, is found the following:

"ANNOUNCEMENTS

4-

was supported by the following affidavit of her attorney:
 "Jacob Levy, being first duly sworn on oath deposes and says
 that he is the attorney for plaintiff in the above entitled case.
 "Affiant further states that when the said case was called on
 the trial call of July 12, 1940, the case was continued to July
 23, 1940; that on said date, in Room 902, where cases of this
 nature and character are heard, the court had adjourned for the
 summer vacation.

"Affiant further states that shortly after the court had con-
 vened for the September term, affiant made inquiries of the clerk
 in Room 902 and was advised that the case in question had been
 set for October 29, 1940. Affiant further states that the said
 case appeared in the Daily Municipal Court Record of October 29,
 1940, for October 29, 1940, a copy of which Municipal Court
 Record is hereto attached and marked plaintiff's Exhibit 1.
 "Affiant further states that he appeared with his client and
 witnesses in Room 902 on October 29, 1940, and that the case was
 called for hearing before His Honor, Judge Green, in Room 902;
 that the evidence was taken in said case and that Judge Green
 found for the plaintiff and entered judgment in favor of the
 plaintiff and against the defendant."

attached to and made a part of attorney Levy's affidavit
 was a copy of the Municipal Court Record of October 29, 1940.
 The Municipal Court Record of said date showed various trial
 calls for the next day, October 29, 1940, including a call
 entitled "Room 902 City Hall - Judge Eugene McCarthy, 9:30 A. M."
 Non-Jury Tort Cases." The instant case was on said call and
 Judge Green presided in that branch of the court on October
 29, 1940, instead of Judge McCarthy.
 In another column of the Municipal Record of October 29,

1940, is found the following:

"In the matter of preparing an October, 1940 Special Civil Trial Calendar for the First District of the Municipal Court of Chicago.

"General Order No. 1147

"It Is Hereby Ordered, That the Clerk of the Municipal Court of Chicago be directed to prepare a Calendar of all pending First Class and ~~Fourth~~ Class Jury and Non-Jury, civil cases in the First District, which stand 'Continued Generally' or 'Without Date' or in which no service has been had prior to January 1, 1940, which said Calendar is to be known as the October, 1940 Special Civil Trial Calendar for the First District of the Municipal Court of Chicago.

"This Special Civil Trial Calendar will consist of:

"Contract - 'Continued Generally' and 'Without Date' cases

"Tort - 'Continued Generally' and 'Without Date' cases

"Attachment 'Continued Generally' and 'Without Date' cases

"Replevin - Same

"Detinue - Same

"Distress for Rent - No Service cases

"Contract - Same

"Tort - Same

"Replevin - Same

"Personal Property Tax Cases - Same

"It Is Further Ordered, That the call of this Calendar begin October 28, 1940, at 2:00 o'clock P. M. In Room 915 City Hall.

"It Is Further Ordered That this order be spread upon the records of this court.

"Dated at Chicago, Ill. this 15th day of October, A. D. 1940.
(Italics ours.)

"Enter: John J. Sonstebly,
"Chief Justice."

"In the matter of preparing an agenda, 1940, the Special Civil Trial Calendar for the First District of the Municipal Court of Chicago.

"General Order No. 1147

"It is hereby ordered, that the Clerk of the Municipal Court of Chicago be directed to prepare a Calendar of all pending cases Class and Fourth Class Jury and Non-Jury, civil cases in the First District, which stand 'Continued Generally' or 'Without Date' or in which no service has been had prior to January 1, 1940, which said Calendar is to be known as the Calendar, 1940 Special Civil Trial Calendar for the First District of the Municipal Court of Chicago.

"This Special Civil Trial Calendar will consist of:
"Contract - 'Continued Generally' and 'Without Date' cases

"Tort - 'Continued Generally' and 'Without Date' cases
"Attachment 'Continued Generally' and 'Without Date' cases

"Replevin - Same

"Detinue - Same

"Distress for Rent - No Service cases

"Contract - Same

"Tort - Same

"Replevin - Same

"Personal Property Tax Cases - Same

"It is further ordered, that the call of this Calendar begin October 28, 1940, at 1:00 o'clock P.M. in Room 211 City Hall.

"It is further ordered that this order be spread upon the records of this court.

"Dated at Chicago, Ill. this 15th day of October, A.D. 1940.

(Initials over.)

"Witness: John J. Donahue,
"Chief Justice."

It is undisputed that when this case appeared on the trial call on July 12, 1940, it was continued until July 23, 1940, and, the latter date falling within the vacation period, it was continued "without date." The photostatic copy of the "half sheet" in this cause shows no order or memorandum of an order thereon continuing the case for trial to October 29, 1940, or setting it for trial on that date.

Were defendants or their attorneys negligent in failing to discover that this case was included in the trial call for October 29, 1940, in Room 902 City Hall, as announced in the Municipal Court Record of October 28, 1940? We think not. While under the rules of the Municipal court attorneys and litigants are bound to take notice of announcements and calls made in the Municipal Court Record concerning their cases pending in said court, in our opinion defendants and their attorneys were not bound to search for this case on the call of cases set for trial on October 29, 1940, in Room 902 City Hall, in view of the fact that the Municipal Court Record of October 28, 1940, and all issues of said publication, commencing with that of October 15, 1940, carried the announcement of the order entered by the Chief Justice of the Municipal court, heretofore set forth, that the Clerk of said court "prepare a calendar of all pending First Class and Fourth Class Jury and Non-Jury civil cases *** which stand 'Continued Generally' or 'Without Date' *** which said Calendar is to be known as the October, 1940 Special Civil Trial Calendar." This order as announced further specified, "This Special Civil Trial Calendar will consist of" (several classes of cases), including "Tort - 'Continued Generally' and 'Without Date' cases" and "the calls of this Calendar begin October 28, 1940, at 2:00 o'clock P. M. In Room 915 City Hall."

Since this is a tort case and since it was continued "without

It is undisputed that when this case appeared on the trial call on July 12, 1940, it was continued until July 23, 1940, and the latter date falling within the vacation period, it was continued "without date." The photostatic copy of the "call sheet" in this cause shows no order or memorandum of an order or motion continuing the case for trial to October 28, 1940, or setting it for trial on that date.

Were defendants or their attorneys negligent in failing to discover that this case was included in the trial call for October 29, 1940, in Room 902 City Hall, as announced in the Municipal Court Record of October 28, 1940? We think not. While under the rules of the Municipal Court attorneys and litigants are bound to take notice of announcements and calls made in the Municipal Court Record concerning their cases pending in said court, in our opinion defendants and their attorneys were not bound to search for this case on the call of cases set for trial on October 29, 1940, in Room 902 City Hall, in view of the fact that the Municipal Court Record of October 28, 1940, and all issues of said publication, commencing with that of October 15, 1940, carried the announcement of the order entered by the Chief Justice of the Municipal Court, heretofore set forth, that the Clerk of said court "prepare a calendar of all pending first class and fourth class jury and non-jury civil cases which stand 'Continued Generally' or 'Without Date' and which said calendar is to be known as the October 1940 Special Civil Trial Calendar." This order as announced further specified, "This Special Civil Trial Calendar will consist of" (several classes of cases), including "first - 'Continued Generally' and 'Without Date' cases" and "the call of this calendar begin October 28, 1940, at 9:00 o'clock P. M. in Room 902 City Hall." Since this is a tort case and since it was continued "without

date," it clearly came within the classification of cases covered by the foregoing order, the call of which cases was to begin at 2 P. M. on October 28, 1940, in Room 915 City Hall. This being the call on which this case properly belonged, there was no necessity or obligation on the part of defendants or their attorneys to examine every other court call in the Municipal Court Record of October 28, 1940, including the trial call for October 29, 1940, in Room 902 City Hall, to ascertain the possibility of its appearing on some other call. This is true even though it does not appear that defendants or their attorneys had notice or knowledge of the announcement of the aforesaid order of the Chief Justice of the Municipal court.

Inasmuch as this case belonged on the call that was to commence at 2 P. M. on October 28, 1940, in Room 915 City Hall, and on no other call, it is obvious that its appearance on the trial call for Room 902 City Hall on October 29, 1940, could only have occurred by reason of mistake or inadvertence on the part of the clerk of the court. There was only one possible way that the case could have properly been on the trial call for Room 902 City Hall on October 29, 1940, and that was that it was reached and called on the Room 915 City Hall call on the afternoon of October 28, 1940, and assigned for trial on October 29, 1940, in Room 902 City Hall. But it was not so called and assigned and it is not claimed by plaintiff that it was.

The only explanation offered by plaintiff for the appearance of this case on the Room 902 City Hall call for October 29, 1940, is that of attorney Levy that sometime in September, 1940, the clerk in Room 902 City Hall informed him that the case was set for trial on October 29, 1940, in that courtroom. This purported statement of the clerk, which is entirely inconsistent and at variance with the aforementioned order of the Chief Justice of the

date," it clearly was within the classification of cases covered by the foregoing order, the call of which seems to have been at 2 P. M. on October 29, 1940, in Room 902 City Hall. This being the call on which this case properly belonged, there was no necessity on obligation on the part of defendants or their attorneys to examine every other court call in the Municipal Court Record of October 29, 1940, including the trial call for October 29, 1940, in Room 902 City Hall, to ascertain the possibility of its appearing on some other call. This is true even though it does not appear that defendants or their attorneys had notice or knowledge of the announcement of the afternoon order of the Chief Justice of the Municipal Court.

Inasmuch as this case belonged on the call that was to commence at 2 P. M. on October 29, 1940, in Room 902 City Hall, and on no other call, it is obvious that its appearance on the trial call for Room 902 City Hall on October 29, 1940, could only have occurred by reason of mistake or inadvertence on the part of the clerk of the court. There was only one possible way in which this could have properly been on the trial call for Room 902 City Hall on October 29, 1940, and that was that it was reached and called on the Room 902 City Hall call on the afternoon of October 29, 1940, and assigned for trial on October 29, 1940, in Room 902 City Hall. But it was not so called and assigned and it is not claimed by plaintiff that it was.

The only explanation offered by plaintiff for the appearance of this case on the Room 902 City Hall call for October 29, 1940, is that of attorney Day that sometime in September, 1940, the clerk in Room 902 City Hall informed him that the case was set for trial on October 29, 1940, in that courtroom. This purported statement of the clerk, which is entirely inconsistent and in variance with the aforementioned order of the Chief Justice of the

Municipal court, must be entirely disregarded.

The appearance of this case on the trial call for Room 902 City Hall on October 29, 1940, was clearly due to the misprision of the Clerk of the court in that he had no authority to place it on said call and it has been repeatedly held that misprision of a clerk of a court under circumstances such as appear here furnishes sufficient ground for the allowance of a motion in the nature of a writ of error coram nobis to vacate a judgment at a term subsequent to its entry. (Brady v. Washington Insurance Co., 82 Ill. App. 380; Rosenthal v. Wald, 252 Ill. App. 383.) The misprision of the clerk here shown was such an error of fact, which, if known to the court, would have precluded the entry of the judgment herein. It is certain that if Judge Green, who entered the judgment, had known that this case was improperly and without authority on his trial call on October 29, 1940, he would not have entered said judgment.

Plaintiff contends that the motion to vacate the judgment should have been presented to Judge Green, who entered same. It is true that the motion to vacate should have been presented to Judge Green, but since it was not and was presented to Judge Hermes, the then acting Chief Justice of the Municipal court, and plaintiff's attorney participated in all of the proceedings before Judge Hermes without objection, plaintiff will not be permitted to object to such proceedings for the first time in this court.

Other points have been urged and considered but in the view we take of this cause we deem further discussion unnecessary.

For the reasons stated herein the order of the Municipal court is affirmed.

ORDER AFFIRMED.

Scanlan, P. J., and Friend, J., concur.

Municipal court, must be entirely disregarded.

The appearance of this case on the trial call for Room 902 City Hall on October 29, 1940, was clearly due to the mispistion of the Clerk of the court in that he had no authority to place it on said call and it has been repeatedly held that mispistion of a clerk of a court under circumstances such as appear here furnishes sufficient ground for the allowance of a motion in the nature of a writ of error coram nobis to vacate a judgment at term subsequent to its entry. (Wright v. Washington Insurance Co., 82 Ill. App. 380; Rosenbalm v. Wink, 252 Ill. App. 383.) The mispistion of the clerk here shown was such an error of fact, which, if known to the court, would have precluded the entry of the judgment herein. It is certain that Judge Green, who entered the judgment, had known that this case was improperly and without authority on his trial call on October 29, 1940, he would not have entered said judgment.

Plaintiff contends that the motion to vacate the judgment should have been presented to Judge Green, who entered same. It is true that the motion to vacate should have been presented to Judge Green, but since it was not and was presented to Judge Hermes, the then acting Chief Justice of the Municipal court, and Plaintiff's attorney participated in all of the proceedings before Judge Hermes without objection, Plaintiff will not be permitted to object to such proceedings for the first time in this court.

Other points have been urged and considered but in the view we take of this case we deem further discussion unnecessary. For the reasons stated herein the order of the Municipal court is affirmed.

ORDER AFFIRMED.

Samuel, J., and Friend, J., concur.

41958

LOUISE M. ZIEBELL,
Appellee,

v.

TOWN OF BREMEN, a corporation,
Appellant.

2886
APPEAL FROM CIRCUIT COURT,

COOK COUNTY.

313 I.A. 266²

MR. JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

This is an action at law brought by plaintiff, Louise M. Ziebell, against defendant, Town of Bremen, a quasi municipal corporation, to recover upon a tax anticipation warrant and a township note. Defendant's motion to dismiss plaintiff's amended complaint was overruled and, defendant electing to abide by its motion to dismiss, judgment was entered against it for \$1,453. This appeal seeks to reverse the judgment.

Plaintiff's amended complaint consists of two counts, the first of which alleged substantially that December 29, 1938, the township sold and the plaintiff purchased a tax anticipation warrant issued by said township for \$500; and that said warrant contains the following provisions:

"Principal hereof and interest hereon will be paid in lawful money of the United States of America from the proceeds of taxes, when received, heretofore levied upon all the taxable property in said township for the year 1937 for the relief and support of poor and indigent persons lawfully resident within said Township.

"This warrant is issued in anticipation of taxes so levied for the year 1937 to provide a fund to meet and defray the necessary expenses of said Township for the relief and support of poor and indigent persons lawfully resident within said Township, and is payable, both principal and interest, in the numerical order of its issuance, solely from said taxes when

LOUISE B. ZIMMERMAN, Appellee,

v.

TOWN OF BREMEN, a corporation, Appellant.

APPEAL FROM CIRCUIT COURT,

COOK COUNTY.

3131A-288

MR. JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

This is an action at law brought by Plaintiff, Louise B.

Zimmerman, against defendant, Town of Bremen, a quasi municipal corporation, to recover upon a tax anticipation warrant and a

township note. Defendant's motion to dismiss Plaintiff's amended complaint was overruled and, defendant electing to abide by its motion to dismiss, judgment was entered against it for \$1,473. This appeal seeks to reverse the judgment.

Plaintiff's amended complaint consists of two counts,

the first of which alleged substantially that December 29,

1938, the township sold and the plaintiff purchased a tax anticipation warrant issued by said township for \$500; and

that said warrant contains the following provisions:

"Principal hereof and interest hereon will be paid in

lawful money of the United States of America from the proceeds of taxes, when received, hereafter levied upon all the taxable property in said township for the year 1937 for the relief and support of poor and indigent persons lawfully residing within said township.

"This warrant is issued in anticipation of taxes so levied

for the year 1937 to provide a fund to meet and defray the

necessary expenses of said township for the relief and support of poor and indigent persons lawfully residing within said Town-

ship, and its principal and interest, in the

numerical order of its issuance, solely from said taxes when

collected, which taxes are hereby assigned and pledged to the payment of this warrant and all warrants issued against and in anticipation of such taxes, the total of which warrants so issued does not exceed seventy-five per cent *** of the tax levy made therefor and shall be received by any collector of taxes in payment of the taxes against which it is issued."

The complaint further alleged that "the tax levied by said Township for the year 1937 for the relief and support of poor and indigent persons lawfully resident within said Township was Fifteen Thousand Dollars; *** the total of all tax warrants issued against said levy did not exceed Thirty-five Hundred Dollars ***; the total of taxes collected on said levy was over Eight Thousand Dollars ***;" that "all of the taxes collected under said levy were by the Board of Auditors of said Township used in paying legitimate and legal claims against said Township and that none of said Tax Warrants were paid nor was any notice published or otherwise given to the holders of said Warrants (plaintiff being one of said holders as was then well known to the officials of said Township) that money was available for the payment of said warrants or any of them;" and that there is due plaintiff from defendant upon said Warrant the sum of \$500.

The second count of the complaint alleged that on August 5, 1940, the Board of Auditors of the Township of Bremen adopted the following resolution:

"Whereas it appears that the Supervisor of the Town of Bremen has used the amount of Eight Hundred Sixty Dollars *** collected for and belonging to the bond fund, and in consequence thereof the Town can not pay the interest now due on said bonds.

"Therefore be it and it is hereby resolved by the Board of Town Auditors in special meeting assembled that the Supervisor and Clerk of this town be and they are hereby authorized to borrow the sum of Eight Hundred Sixty Dollars *** to be used in paying said interest and they are further hereby authorized to repay said loan with 5% interest from the second installment of the 1939 taxes."

collected, which taxes are hereby assessed and charged to the
payment of this warrant and all arrears thereof and in
anticipation of such taxes, the total of which amounts to
assessed does not exceed seventy-five per cent of the tax levy
made therefor and shall be received by any collector of taxes in
payment of the taxes against which it is issued.

The complainant further alleged that the tax levied by said
Township for the year 1940 for the relief and support of poor and
indigent persons lawfully residing within said Township was
Fifteen thousand Dollars; that the total of all tax warrants
issued against said levy did not exceed thirty-five thousand
Dollars; that the total of taxes collected on said levy was over
Eight thousand Dollars; that "all of the taxes collected
under said levy were by the Board of Additors of said Township
used in paying legitimate and legal claims against said Township
and that none of said tax warrants were paid nor was any notice
published or otherwise given to the holders of said warrants (plain-
tiff being one of said holders) as was then well known to the offi-
cials of said Township) that money was available for the payment
of said warrants or any of them; and that there is the plaintiff
from defendant upon said warrant the sum of \$200.

The second count of the complaint alleged that on August 1,
1940, the Board of Additors of the Township of Green adopted the
following resolution:

"Whereas it appears that the Supervisor of the Town of
Green has used the amount of eight hundred thirty dollars ***
collected for and belonging to the bond fund, and in consequence
thereof the town can not pay the interest now due on said bonds.

"Therefore be it and it is hereby resolved by the Board
of Town Additors in special session assembled that the
Supervisor and Clerk of this town be and they are hereby
authorized to borrow the sum of eight hundred thirty dollars
*** to be used in paying said interest and they are further
authorized to repay said loan with 2% interest from
the second installment of the 1940 taxes."

It was further alleged that in compliance with said resolution the supervisor and clerk of said township borrowed \$860 from plaintiff and executed and delivered to her a note in that amount; that the money so borrowed from plaintiff by the township was used by it in paying the interest on the bonds mentioned in the foregoing resolution; that no part of said note has been paid; and that there is still due plaintiff on same \$860 plus interest.

The complaint concluded with a prayer that judgment be entered in favor of plaintiff and against defendant for \$1,434.70 plus interest on the obligations set forth in counts one and two of said complaint.

Defendant's written motion to dismiss plaintiff's complaint averred inter alia that "said amended complaint in Count 1 fails to state a cause of action against this defendant, the Town of Bremen, a quasi-municipal corporation;" and that "the defendant, the Town of Bremen, could not legally issue a note in the nature of that sued upon in Count 11 of the amended complaint upon which it could incur any liability or indebtedness, either actually or contingent,"

Defendant contends (1) that "a municipality is not indebted as a result of issuing tax anticipation warrants and (2) that a municipality does not have the power to borrow money and issue commercial paper and, therefore, plaintiff's amended complaint failed to state any causes of action."

Plaintiff's theory is that in equity and good conscience the defendant township should not be permitted to retain moneys which she paid or lent to it and that she is entitled to recover same.

It is admitted that defendant received \$500 from plaintiff in payment of a tax anticipation warrant as charged in the first count of the complaint and that the township received \$860 from

It was further alleged that in compliance with said resolution the supervisor and clerk of said township borrowed \$300 from plaintiff and executed and delivered to her a note in that amount;

that the money so borrowed from plaintiff by the township was used by it in paying the interest on the bonds mentioned in the foregoing resolution; that no part of said note has been paid; and that there is still due plaintiff on said \$300 plus interest.

The complaint concluded with a prayer that judgment be entered in favor of plaintiff and against defendant for \$1,434.70 plus interest on the obligations set forth in counts one and two of said complaint.

Defendant's written motion to dismiss plaintiff's complaint averred inter alia that "said amended complaint in Count I fails to state a cause of action against this defendant, the town of Bremen, a quasi-municipal corporation;" and that "the defendant, the Town of Bremen, could not legally issue a note in the nature of that sued upon in Count II of the amended complaint upon which it could incur any liability or indebtedness, either actually or contingent."

Defendant contends (1) that "a municipality is not indebted as a result of issuing tax anticipation warrants and (2) that a municipality does not have the power to borrow money and issue commercial paper and, therefore, plaintiff's amended complaint failed to state any cause of action."

Plaintiff's theory is that in equity and good conscience the defendant township should not be permitted to retain moneys which she paid or lent to it and that she is entitled to recover same.

It is admitted that defendant received \$300 from plaintiff in payment of a tax anticipation warrant as charged in the first count of the complaint and that the township received \$300 from

her by way of a loan as charged in the second count of the complaint.

In so far as the first count of the complaint is concerned it has been repeatedly held that tax anticipation warrants do not impose any obligation upon the taxing body to pay same to the purchasers or holders thereof. (Dimond v. Commissioner of Highways, 366 Ill. 503; Leviton v. Board of Education, 374 Ill. 594; Berman v. Board of Education, 360 Ill. 535; City of Springfield v. Edwards, 84 Ill. 626; Law v. People, 87 Ill. 385; Fuller v. Heath, 89 Ill. 296; Schulenburg & Boeckler Lumber Co. v. E. St. Louis, 63 Ill. App. 214; Booth v. Opel, 244 Ill. 317; People v. Nelson, 344 Ill. 46; People v. Hamilton, 366 Ill. 455; People v. Hayes, 365 Ill. 318; People v. Huron & Orleans Corp., 368 Ill. 469; People v. Wabash Ry. Co., 368 Ill. 498; People v. Axelrod, 373 Ill. 446; People v. M. Born & Co., 373 Ill. 490.)

In Leviton v. Board of Education, supra, the court said at p. 598:

"A tax anticipation warrant is simply an assignment of tax money which directs the treasurer to pay the holder. In the alternative, it can be presented to the tax collector in full discharge of taxes. We have repeatedly held no debt is created by an anticipation warrant, and after delivery there is no future obligation upon it, either absolute or contingent, to pay out of anything except the levy anticipated, when collected."

In Dimond v. Commissioner of Highways, supra, the court stated at p. 506:

"When the warrant is issued and accepted or sold, the transaction is closed on the part of the municipality, leaving no future obligation upon it, either absolute or contingent, whereby its debt may be increased. The holder of such warrant must look to the specific fund set apart for its payment. We pointed out that, under section 9 of article 9 of the constitution, all taxation by municipal corporations must be for corporate purposes, and that bonds purporting to be a general obligation of the municipality and issued in payment of anticipation warrants, are not for a corporate purpose and are therefore invalid. It follows that a judgment on such a warrant, the payment of which could be exacted from general funds, falls within the same category."

In so far as the first point of the complaint is concerned it has been repeatedly held that tax legislation cannot be construed to impose any obligation upon the taxing body to pay sums to the purchasers or holders thereof. (Dillon v. Commissioner of Internal Revenue, 306 Ill. 503; Linton v. Board of Education, 374 Ill. 99; Bernard v. Board of Education, 36 Ill. 535; Wright v. Board of Education, 84 Ill. 686; Law v. People, 87 Ill. 365; Hatch v. Board of Education, 89 Ill. 296; Smith v. Board of Education, 94 Ill. App. 514; Booth v. People, 94 Ill. 317; People v. Nelson, 344 Ill. 46; People v. Linton, 366 Ill. 475; People v. Hayes, 365 Ill. 51; People v. Board of Education, 368 Ill. 498; People v. Washburn & Co., 368 Ill. 498; People v. Xerox, 373 Ill. 446; People v. Board of Education, 373 Ill. 450.)

at p. 70:

"A tax anticipation warrant is simply an instrument of tax money which directs the treasurer to pay the holder. In the alternative, it can be placed to the credit of the full discharge of taxes. It has previously held no debt as created by an anticipation warrant, but its delivery creates no future obligation upon it, either absolute or contingent, to pay out of anything except the levy anticipated, when collected."

at test of p. 700:

In Diary v. Commission of Inquiry, supra, the court

transfers, it is within the same category."

In Berman v. Board of Education, supra, the court held at pp. 539, 540:

"Such warrants do not constitute, and cannot be construed as constituting, any promise of payment, either express or implied, on the part of the taxing body issuing them, but the holder thereof 'must rely solely upon the ability and fidelity of the revenue officers in the collection and payment of the money mentioned in the warrants.' *** The legal effect of the transaction is that the person receiving such warrant discharges the corporation from all liability on account of the service or obligation for which it was drawn. *** The transaction is similar to that of a bank selling a note 'without recourse.' The holders of tax anticipation warrants must look to the specific fund set apart for the payment of their warrants, as the cases above cited are authority that tax anticipation warrants are not contracts and the municipality is not indebted as a result of their issuance."

In City of Springfield v. Edwards, supra, after stating that a municipality already indebted beyond the constitutional limitation cannot lawfully incur any new debt or liability but that a city so situated may, to defray current expenses, anticipate the collection of taxes already levied, provided that the mode of appropriating or setting apart for that purpose a part of the taxes be such as to impose no liability upon the city, the court enunciated the rule applicable to tax anticipation warrants at pp. 633, 634:

"When the appropriation is made and the warrant or order on the treasury for its payment is issued and accepted, the transaction is closed on the part of the corporation - leaving no future obligation, either absolute or contingent, upon it, whereby its debt may be increased. *** If the making of the appropriation and issuing and accepting a warrant for its payment does not have the effect of relieving the corporation of all liability, or, in other words, if it incurs any liability thereby, it must manifestly incur, either absolutely or contingently, a debt.

"Where a warrant or order, payable from a specific appropriation of a tax levied but not yet collected, is accepted in exchange for services rendered or to be rendered, or for materials furnished or to be furnished, so that there is, in fact, but the exchange of one thing for another, the duty remains for the proper officers to collect and pay over the tax in accordance with the appropriation - but, obviously, for any failure in that regard, the remedy must be against the officers and not against the corporation, for, otherwise, a contingent debt would, in this way, be incurred by the corporation."

It clearly appears from the foregoing authorities that

tax anticipation warrants are not debts and do not represent direct legal obligations of the municipality issuing them. Therefore the Township of Bremen did not become indebted to plaintiff by reason of its issuance and sale to her of the tax anticipation warrant in question. Because of the failure of the proper officers of Bremen to pay plaintiff's tax anticipation warrant, her remedy, if any, is against such officers and their sureties rather than the Township of Bremen.

As to the second count of the complaint, defendant contends that it had no power to borrow the money from and to issue the note to plaintiff and that, therefore, it is not liable for the payment of same. Thus the question presented under this count is whether the defendant township could legally issue a note of the nature of that delivered to plaintiff, upon which it could incur any liability or indebtedness.

Municipalities can only exercise such powers as are conferred upon them by their charters. (Merchants Trust Company v. Chicago, 264 Ill. 76; Stripe v. City of Waukegan, 254 Ill. App. 74.) The power to borrow money and create indebtedness is not an incident of local municipal governments. (Law v. People, 87 Ill. 385; Coquard v. Village of Oquawka, 192 Ill. 355; Merchants Trust Company v. Chicago, *supra*; Hewitt v. Normal School District, 94 Ill. 528; Randolph v. Town of Bernadotte, 243 Ill. App. 581.)

In Law v. People, *supra*, the court said at p. 394:

"The law is, and all persons are presumed to know it, that municipal bodies can only exercise such powers as are conferred upon them by their charters, and all persons dealing with them must see that the body has power to perform the proposed act. Such corporations are created for governmental and not for commercial purposes. Hence power to borrow money or create indebtedness is not an incident to such local governments, and the power cannot be exercised unless it is conferred by their charter, and no one has the right to presume the existence of such a power, and persons proposing to loan money to these bodies must see that the power exists."

In Hewitt v. Normal School District, *supra*, the court used

tax anticipation warrants are not valid and do not represent
direct legal obligations of the municipality issuing them.
Therefore the Township of Brown did not become indebted to
plaintiff by reason of its issuance and the fact of the tax
anticipation warrant in question. Record of the Township of
the proper officers of Brown to pay to plaintiff the anticipation
warrant, for remedy, if any, is against such officers and their
successors rather than the Township of Brown.

As to the second count of the complaint, defendant contends
that it had no power to borrow the money from and to issue the
note to plaintiff and that, therefore, it is not liable for the
payment of same. That the question presented under this count
is whether the Township could legally issue a note of
the nature of that delivered to plaintiff, upon which it could
incur any liability or indebtedness.

Municipalities can only exercise such powers as are con-
ferred upon them by their charters. (City of Chicago v. City of Chicago,
94 Ill. 384; City of Chicago v. City of Chicago, 94 Ill. 384.)
The power to borrow money and create indebtedness is not
an incident of local municipal governments. (Law v. People, 94 Ill. 384;
City of Chicago v. City of Chicago, 94 Ill. 384;
City of Chicago v. City of Chicago, 94 Ill. 384;
City of Chicago v. City of Chicago, 94 Ill. 384;
City of Chicago v. City of Chicago, 94 Ill. 384.)

In Law v. People, 94 Ill. 384, the court said at p. 394:
"The law is, and all persons are presumed to know it, that
municipal bodies can only exercise such powers as are conferred
upon them by their charters, and all persons dealing with them
must see that the body has power to perform the proposed act.
Such consideration is required for governmental acts, and not
commercial purposes. Hence power to borrow money or create in-
debtedness is not an incident to such local governments, and the
power cannot be exercised unless it is conferred by their charter,
and no one has the right to assume the exercise of such a power,
and for one opposing to loan money to these bodies must see
that the power exists."

In Law v. People, 94 Ill. 384, the court said

the following language at p. 531:

"Municipal corporations are not usually endowed with power to enter into traffic or general business, and are only created as auxiliaries to the government in carrying into effect some special governmental policy, or to aid in preserving the order and in promoting the well being of the locality over which their authority extends. Where a corporation is created for business purposes, all persons may presume such bodies, when issuing their paper, are acting within the scope of their power. Not so with municipalities. Being created for governmental purposes, the borrowing of money, the purchase of property on time, and the giving of commercial paper, are not inherent, or even powers usually conferred; and unless endowed with such power in their charters, they have no authority to make and place on the market such paper, and persons dealing in it must see that the power exists. This has long been the rule of this court. Board of Supervisors v. Farwell, 25 Ill. 181; Clark v. Hancock County, 27 Ill. 305; Marshall County v. Cook, 38 Ill. 44; Wiley v. Silliman, 62 Ill. 170; Harding v. Rockford, R. I. & St. L. R. R. Co., 65 Ill. 90; McWhorter v. People, 65 Ill. 290; Town of Big Cove Grove v. Wells, 65 Ill. 263."

There is no statute of this state which conferred upon the defendant township the power and authority to make a loan from plaintiff under the circumstances shown here or to give her a valid note evidencing same.

While we regret plaintiff's unfortunate predicament, we are impelled to hold that under the established law of this state she is not entitled to recover under either count of her amended complaint.

The judgment of the Circuit court is reversed and judgment is entered here in favor of defendant and against plaintiff.

JUDGMENT REVERSED AND JUDGMENT HERE
IN FAVOR OF DEFENDANT AND AGAINST
PLAINTIFF.

Scanlan, P. J., and Friend, J., concurs.

42148

BERTHA HESS, SEGEL HESS, LAURA RINGER,
LOTTA RINGER, PHILIP E. RINGER and
SOPHIA G. LEDERER,

Appellees,

v.

AQUITANIA APARTMENTS COMPANY, a cor-
poration, BURTON SMITH, M. EDWARD SMITH,
HOWARD D. MOSES, GEORGE CAIN, AARON
COLNON, STUART COLNON, JOHN E. COLNON &
CO., INC., a corporation, and FORT DEAR-
BORN MORTGAGE COMPANY, a corporation,
Appellants.

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

313 I.A. 267

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

The defendants have appealed from an order entered November 24, 1941, granting the motion of plaintiffs for an interlocutory injunction restraining them pending the suit from executing a mortgage on all the property of the corporation for the sum of \$165,000. The bill was filed October 25, 1941. Plaintiffs show that they are the holders of 100 shares of the common stock of the Aquitania Apartments Company, an Illinois corporation. They sue for themselves and other stockholders. As of April 30, 1940, and at present the total stock of the corporation consists of 9,750 common shares. The principal asset of the corporation is an apartment building of 82 apartments situated at 5000 North Marine Drive in Chicago. The present directors are defendants, M. Edward Smith (who is also president), Burton Smith (who is also secretary) and attorney Howard D. Moses. In 1938, 2,230 shares of the stock were purchased from owners at about 50% of its book value, and a substantial part of these shares were transferred on the books into the names of the two Smiths and defendant Aaron Colnon. The two Smiths and Aaron Colnon are alleged to also be officers or employees of the Fort Dearborn Mortgage Company, from whom it is proposed to negotiate the mortgage. The purchasers, it is alleged, did not purchase

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 1911, 1912, 1913, 1914, 1915, 1916, 1917, 1918, 1919, 1920, 1921, 1922, 1923, 1924, 1925, 1926, 1927, 1928, 1929, 1930, 1931, 1932, 1933, 1934, 1935, 1936, 1937, 1938, 1939, 1940, 1941, 1942, 1943, 1944, 1945, 1946, 1947, 1948, 1949, 1950, 1951, 1952, 1953, 1954, 1955, 1956, 1957, 1958, 1959, 1960, 1961, 1962, 1963, 1964, 1965, 1966, 1967, 1968, 1969, 1970, 1971, 1972, 1973, 1974, 1975, 1976, 1977, 1978, 1979, 1980, 1981, 1982, 1983, 1984, 1985, 1986, 1987, 1988, 1989, 1990, 1991, 1992, 1993, 1994, 1995, 1996, 1997, 1998, 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2037, 2038, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2046, 2047, 2048, 2049, 2050, 2051, 2052, 2053, 2054, 2055, 2056, 2057, 2058, 2059, 2060, 2061, 2062, 2063, 2064, 2065, 2066, 2067, 2068, 2069, 2070, 2071, 2072, 2073, 2074, 2075, 2076, 2077, 2078, 2079, 2080, 2081, 2082, 2083, 2084, 2085, 2086, 2087, 2088, 2089, 2090, 2091, 2092, 2093, 2094, 2095, 2096, 2097, 2098, 2099, 2100, 2101, 2102, 2103, 2104, 2105, 2106, 2107, 2108, 2109, 2110, 2111, 2112, 2113, 2114, 2115, 2116, 2117, 2118, 2119, 2120, 2121, 2122, 2123, 2124, 2125, 2126, 2127, 2128, 2129, 2130, 2131, 2132, 2133, 2134, 2135, 2136, 2137, 2138, 2139, 2140, 2141, 2142, 2143, 2144, 2145, 2146, 2147, 2148, 2149, 2150, 2151, 2152, 2153, 2154, 2155, 2156, 2157, 2158, 2159, 2160, 2161, 2162, 2163, 2164, 2165, 2166, 2167, 2168, 2169, 2170, 2171, 2172, 2173, 2174, 2175, 2176, 2177, 2178, 2179, 2180, 2181, 2182, 2183, 2184, 2185, 2186, 2187, 2188, 2189, 2190, 2191, 2192, 2193, 2194, 2195, 2196, 2197, 2198, 2199, 2200, 2201, 2202, 2203, 2204, 2205, 2206, 2207, 2208, 2209, 2210, 2211, 2212, 2213, 2214, 2215, 2216, 2217, 2218, 2219, 2220, 2221, 2222, 2223, 2224, 2225, 2226, 2227, 2228, 2229, 2230, 2231, 2232, 2233, 2234, 2235, 2236, 2237, 2238, 2239, 2240, 2241, 2242, 2243, 2244, 2245, 2246, 2247, 2248, 2249, 2250, 2251, 2252, 2253, 2254, 2255, 2256, 2257, 2258, 2259, 2260, 2261, 2262, 2263, 2264, 2265, 2266, 2267, 2268, 2269, 2270, 2271, 2272, 2273, 2274, 2275, 2276, 2277, 2278, 2279, 2280, 2281, 2282, 2283, 2284, 2285, 2286, 2287, 2288, 2289, 2290, 2291, 2292, 2293, 2294, 2295, 2296, 2297, 2298, 2299, 2300, 2301, 2302, 2303, 2304, 2305, 2306, 2307, 2308, 2309, 2310, 2311, 2312, 2313, 2314, 2315, 2316, 2317, 2318, 2319, 2320, 2321, 2322, 2323, 2324, 2325, 2326, 2327, 2328, 2329, 2330, 2331, 2332, 2333, 2334, 2335, 2336, 2337, 2338, 2339, 2340, 2341, 2342, 2343, 2344, 2345, 2346, 2347, 2348, 2349, 2350, 2351, 2352, 2353, 2354, 2355, 2356, 2357, 2358, 2359, 2360, 2361, 2362, 2363, 2364, 2365, 2366, 2367, 2368, 2369, 2370, 2371, 2372, 2373, 2374, 2375, 2376, 2377, 2378, 2379, 2380, 2381, 2382, 2383, 2384, 2385, 2386, 2387, 2388, 2389, 2390, 2391, 2392, 2393, 2394, 2395, 2396, 2397, 2398, 2399, 2400, 2401, 2402, 2403, 2404, 2405, 2406, 2407, 2408, 2409, 2410, 2411, 2412, 2413, 2414, 2415, 2416, 2417, 2418, 2419, 2420, 2421, 2422, 2423, 2424, 2425, 2426, 2427, 2428, 2429, 2430, 2431, 2432, 2433, 2434, 2435, 2436, 2437, 2438, 2439, 2440, 2441, 2442, 2443, 2444, 2445, 2446, 2447, 2448, 2449, 2450, 2451, 2452, 2453, 2454, 2455, 2456, 2457, 2458, 2459, 2460, 2461, 2462, 2463, 2464, 2465, 2466, 2467, 2468, 2469, 2470, 2471, 2472, 2473, 2474, 2475, 2476, 2477, 2478, 2479, 2480, 2481, 2482, 2483, 2484, 2485, 2486, 2487, 2488, 2489, 2490, 2491, 2492, 2493, 2494, 2495, 2496, 2497, 2498, 2499, 2500, 2501, 2502, 2503, 2504, 2505, 2506, 2507, 2508, 2509, 2510, 2511, 2512, 2513, 2514, 2515, 2516, 2517, 2518, 2519, 2520, 2521, 2522, 2523, 2524, 2525, 2526, 2527, 2528, 2529, 2530, 2531, 2532, 2533, 2534, 2535, 2536, 2537, 2538, 2539, 2540, 2541, 2542, 2543, 2544, 2545, 2546, 2547, 2548, 2549, 2550, 2551, 2552, 2553, 2554, 2555, 2556, 2557, 2558, 2559, 2560, 2561, 2562, 2563, 2564, 2565, 2566, 2567, 2568, 2569, 2570, 2571, 2572, 2573, 2574, 2575, 2576, 2577, 2578, 2579, 2580, 2581, 2582, 2583, 2584, 2585, 2586, 2587, 2588, 2589, 259

The defendant have appealed from an order entered November 24, 1941, granting the motion of plaintiff for an interlocutory injunction restraining them from the sale and execution of a mortgage on all the property of the corporation for the sum of \$185,000. The bill was filed October 25, 1941. The bill shows that they are the holders of 100 shares of the common stock of the Atlantic Apartment Company, an Illinois corporation. They are for themselves and other stockholders, as of April 30, 1940, and at present the total stock of the corporation consists of 8,750 common shares. The principal asset of the corporation is an apartment building of 82 apartments situated at 5000 North Halsted Drive in Chicago. The present directors are defendant, H. Albert Smith (who is also president), Nathan Smith (who is also secretary) and attorney Howard H. Brown. In 1938, 2,950 shares of the stock were purchased from owners at about 50% of its book value, and a substantial part of these shares were transferred on the books into the names of the two Smiths and defendant Albert Brown. The two Smiths and Brown are alleged to have no office or employees of the Atlantic Apartment Company, from whom it is proposed to negotiate the mortgage. The purpose, it is alleged, is to purchase

in their own behalf but as nominees of defendants Aaron Colnon, Stuart Colnon, John E. Colnon & Co., Inc., or a syndicate or corporation with which the Colnons were associated.

The bill charges that the purchasers of this stock formulated a plan to secure control of the Aquitania corporation by acquiring enough stock to enable them to elect all the directors and officers of the company. To that end they have acquired 1,233 more shares of stock so that at the time of the filing of the bill they held 3,463 shares out of the total 9,750 shares which constituted the capital stock of the Aquitania corporation.

Since the original acquisition of the shares by defendants the net income of the Aquitania corporation has been about \$50,000 after payment of expenses. The complaint says for the purpose of depressing the price of the stock of the corporation (more of which they wish to acquire) defendants have expended an amount in excess of the income of the corporation for rehabilitation; that a substantial amount of this rehabilitation was not required and could have been deferred. There is an existing mortgage on which there is a balance unpaid of \$110,750, payable semi-annually at the rate of \$7,000 per year, with a final maturity of \$78,250 on October 20, 1947. The earned surplus of the corporation on April 30, 1941, was \$16,444.69. On September 17, 1941, the directors suggested the proposal to negotiate a new first mortgage loan of \$165,000. September 22, notice of a special meeting of the stockholders was sent out, at which approval of the plan would be requested. A copy of this notice is attached to the complaint. Pending the suit, the court permitted the meeting of the stockholders to be held, and more than two-thirds of the shares were voted in favor of the loan. It is proposed the new mortgage shall be issued through the Fort Dearborn Mortgage Company, or some principal for whom it is agent or broker. The two Smiths are associated with both the Aquitania

in their own behalf but as holders of debentures issued by
Stewart Gilman, John E. Gilman & Co., Inc., or a subsidiary or
corporation with which the Gilman were associated.
The bill charges that the directors of this bank
formulated a plan to secure control of the bank's corporation
by acquiring enough stock to enable them to elect all the direc-
tors and officers of the company. To that end they have secured
1,233 more shares of stock so that at the time of the filing of
the bill they held 1,433 shares out of the total 1,750 shares
which constituted the capital stock of the bank's corporation.
(Since the original acquisition of the shares by purchase
into the net income of the bank's corporation had been about
\$20,000 after payment of expenses, the corporation was for the
purpose of depressing the price of the stock of the corporation
(more of which they wish to acquire) statements have been made
an amount in excess of the income of the corporation for the
dilution; that a substantial amount of this dilution has
not repaid and could have been delayed. There is an existing
mortgage on which there is a balance due of \$110,000, payable
semi-annually at the rate of \$7,000 per year, with a final matu-
rity of \$78,000 on October 30, 1947. The unpaid balance of the
corporation on April 30, 1947, was \$10,000. On September 15,
1941, the directors requested the trustee to pay out a sum
first mortgage loan of \$18,000. (September 25, notice of a special
meeting of the stockholders was sent out, at which meeting of
the plan would be presented. A copy of this notice is attached
to the complaint. During the suit, the court postponed the
meeting of the stockholders to be held, and gave them two-thirds
of the shares were voted in favor of the loan. It is proposed
the new mortgage shall be placed through the First National
Mortgage Company, of New Orleans, for whom it is about as
broker. The two bills are combined with both the bank's

and the Fort Dearborn corporations and stand in a fiduciary relationship to each of them.

Prior to April 1, 1940, the combined salaries of officers of the Aquitania corporation did not exceed \$1,000 per year. On that date these defendant directors increased the salaries of these officers to \$3,000 per year, and it is averred the salaries are in excess of a reasonable value of any services rendered. The complaint also charges that benefit from this increase in salaries inured to the principals of the Smiths and Cain, by which they profit. At the same time the defendant directors voted to retain Mr. Moses as attorney for \$600 per year. The bill charges this is excessive.

In 1937, John E. Colnon & Co., Inc. was employed to rent and manage the building, receiving a compensation of 3-1/2% of the gross rentals. After the purchase of this stock this compensation was increased to 4%, which the bill says is more than other reliable firms charge for such services. In addition an employee of John E. Colnon & Co. is given his rent free in the building. The bill says that John E. Colnon & Co. has made excessive expenditures and received commissions to which it is not entitled; that it has not performed its services for the benefit of the Aquitania Apartments Company but has caused funds to be improperly expended or made excessive expenditures or earned commissions to which it was not lawfully entitled.

In their letter to the stockholders, dated September 1941, (which appears as Exhibit A of the bill and is signed president of the corporation) it is stated that the directors are aware that the stockholders have been disappointed in not receiving dividends since the organization of the company in 1936; payment of dividends does not seem probable for some time

and the Fort Belvoir corporation and stand in a fiduciary relationship to each of them.

Prior to April 1, 1930, the combined salaries of officers of the Atlanta corporation did not exceed \$1,500 per year. On that date these defendant directors increased the salaries of these officers to \$5,000 per year, and it is averred the salaries are in excess of a reasonable value of any services rendered. The complaint also charges that benefit from this increase in salaries inured to the principals of the Atlanta and Belvoir corporations. At the same time the defendant directors voted to retain Mr. Jones as attorney for \$500 per year. The bill charges this is excessive.

In 1933, John E. Dolan & Co., Inc. was assigned to rent and manage the building, receiving a compensation of \$1,500 of the gross rentals. After the purchase of this stock this compensation was increased to \$2, which the bill says is more than other reliable firms charge for such services. In addition an employee of John E. Dolan & Co. is given his rent free in the building. The bill says that John E. Dolan & Co. has made excessive expenditures and received commissions to which it is not entitled; that it has not performed its services for the benefit of the Atlanta corporation; but has caused funds to be improperly expended or made excessive expenditures or earned excessive commissions to which it was not lawfully entitled. In their letter to the stockholders, dated September 1931, (which appears as Exhibit A of the bill and is signed by the president of the corporation) it is stated that the directors were that the stockholders have been disappointed in not receiving dividends since the organization of the company in 1925; payment of dividends does not seem possible for some time.

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the directors have decided that stockholders who so wish should have a chance to dispose of their stock, and that upon completion of this refinancing arrangement an offer to retire a limited number of shares would be sent to all the stockholders. The letter states that the proceeds would be used to retire the present loan of \$114,250, to rehabilitate the lobby at a cost of \$15,000, to add \$20,000 to current working capital and to retire and cancel shares of the capital stock of the company in accordance with an offer to be made at a subsequent date.

Some of defendants filed an answer to plaintiffs motion for an injunction, some made a motion to strike or deny plaintiffs motion. They also filed separate motions to dismiss the suit because the complaint did not state a cause of action. The Court afterwards on November 24, 1941, entered the order from which this appeal is taken.

Defendants contend that the issuance of an injunction under the facts stated in the bill of complaint is an unwarranted interference by the court with the internal management of a corporation, and they cite a large number of well known cases, as McQuillen v. National Cash Register Co., 27 Fed. Supp. 639, 647, where it is said it is not the function of a court to substitute its judgment for that of persons lawfully in control of a corporation. People ex rel. Barrett v. Shurtleff, 353 Ill. 248, 262; Coquard v. Nat'l. Linseed Oil Co., 171 Ill. 480, 486; and Wright v. Heublein, 238 Fed. 321. There is no doubt about this general rule. However, the rule is not intended to place a minority at the mercy of a majority who deal unfairly with them. On the contrary, the officers and directors of a corporation are trustees for all the stockholders and have no right to act either oppressively, and the powers of a court of equity will be used to prevent such acts on the part of those who may be

the directors have decided that stockholders who so wish should have a chance to dispose of their stock, and that upon completion of this retrenching arrangement an offer to retire a limited number of shares would be sent to all the stockholders. The letter states that the proceeds would be used to retire the present loan of \$14,750, to rehabilitate the lobby at a cost of \$18,000, to add \$20,000 to current working capital and to retire and cancel shares of the capital stock of the company in accordance with an offer to be made at a subsequent date.

Some of defendants filed an answer to plaintiffs' motion for an injunction, some made a motion to strike or deny plaintiffs' motion. They also filed separate motions to dismiss the suit because the complaint did not state a cause of action. The Court affirmed on November 24, 1941, entered the order from which this appeal is taken.

Defendants contend that the issuance of an injunction under the facts stated in the bill of complaint is an unwarranted interference by the court with the internal management of a corporation, and they cite a large number of well known cases, including Woolfenden v. National Cash Register Co., 27 Fed. Cl. 529, 547, where it is said it is not the function of a court to undertake the judgment for that of persons lawfully in control of a corporation. Patent v. East, Garrett v. Louisville, 252 U.S. 100, 101; General v. West, Liberty Oil Co., 171 Ill. 420, 422; and Wells v. Wells, 252 U.S. 100, 101. There is no doubt about this rule. However, the rule is not intended to block a remedy which the mercy of a justice who best ultimately will know. On the contrary, the ultimate and distinctive of a corporation is the right for all the stockholders and have no right to be either treated or oppressed, and the power of a court of equity will need to prevent such state on the part of those who are

control of the internal management of a corporation.

The complaint is duly verified and the motion to strike admits well pleaded facts averred in the complaint to be true. It is said that the bill does not use the word "fraud" in connection with its charges. The use of that word, however, would be a mere epithet. The question is whether the facts stated would, as a matter of law, if true, amount to a fraud. The bill does charge a plan and purpose on the part of these defendants to secure for themselves benefits to which they are not entitled. It charges an attempt to manipulate the price of the stock of the corporation in such a way as to enable the defendants to secure it for much less than it is worth, and to that end it charges a refusal to pay dividends, the use of the funds of the corporation for unnecessary expenses, and it alleges that the plan to make this loan is a device of these persons to the same end. There is no denial of the allegation that the salary of officers has been tripled and that there is no benefit to the corporation from the increased salaries. The facts stated, if true, are such that any right thinking person would say that the conduct described ought not to be approved. The facts averred show that the plan to borrow money on the assets of the corporation to retire a part of the capital stock would have the effect of giving to these particular defendants the entire control of the corporation. The purchase by a corporation of its shares of stock has not been considered by the courts of this state as necessarily improper, but courts everywhere have recognized that such purchase may be made in such a way as to bring unconscionable results. The subject is considered in the case of Brown v. Fire Insurance Co. of Chicago, 265 Ill. App. 393, cited in the briefs. We there stated that the courts of this state "are committed generally to the rule that a corporation may, in the absence of charter

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improper

control of the internal management of a corporation.

The complaint is only verified and the action is verified.

admits well pleaded facts averred in the complaint to be true.

It is said that the bill does not use the word "fraud" in con-

nection with its charges. The use of that word, however, would

be a mere epithet. The question is whether the facts stated

would, as a matter of law, if true, amount to a fraud. The bill

does charge a plan and purpose on the part of these defendants

to secure for themselves benefits to which they are not entitled.

It charges an attempt to manipulate the price of the stock of the

corporation in such a way as to enable the defendants to secure

it for much less than it is worth, and to that end it charges

a refusal to pay dividends, the use of the funds of the corporation

for unnecessary expenses, and it alleges that the plan to make

this loan is a device of these persons to the end, that

is no denial of the allegation that the salary of officers has

been tripled and that there is no benefit to the corporation from

the increased salaries. The facts stated, if true, are such that

any right thinking person would say that the conduct described

ought not to be approved. The facts averred show that the plan

to borrow money on the assets of the corporation to retire a part

of the capital stock would have the effect of giving to these

particular defendants the entire control of the corporation. The

purchase by a corporation of its shares of stock has not been

considered by the courts of this state as necessarily improper,

but courts everywhere have recognized that such purchase may be

made in such a way as to bring about an unlawful result. The

subject is considered in the case of Quinn v. First National Co.

of Chicago, 205 Ill. App. 385, cited in the brief. In these

cases the courts of this state have admitted generally

to the rule that a corporation may, in the absence of charter

or statutory restrictions, purchase its own stock, provided it acts in good faith and is neither insolvent or in process of dissolution, and provided such purchase is not prejudicial to the rights of its creditors or stockholders". We also there called attention to the fact that in England and in many of the states such action is illegal under all circumstances and not permitted. This subject is now controlled in this state by statute. Section 157.6 of the General Corporation Act, Chapter 32 of the Ill. Rev. Stat. 1941, provides:

"A corporation shall have power to purchase, take, receive, or otherwise acquire, hold, own, pledge, transfer, or otherwise dispose of its own shares, provided that it shall not purchase, either directly or indirectly, its own shares when its net assets are less than the sum of its stated capital, its paid-in-surplus; any surplus arising from unrealized appreciation in value or revaluation of its assets and any surplus arising from surrender to the corporation of any of its shares, or when by so doing its net assets would be reduced below such sum."

In the Illinois Business Corporation Act Annotated, § 6, page 39, the language of the statute is explained as follows:

"The general rule established in this section is equivalent in most cases to the rule that purchases of a corporation's own shares may be made only 'out of' earned surplus. Because of the difficulty in forming an adequate definition of 'earned surplus' the rule was stated indirectly forbidding purchases 'out of' stated capital and various types of surplus other than earned surplus."

In this case the complaint states that the earned surplus is \$16,444.69. It also appears that if the proposed mortgage is executed the amount available for the purchase of shares of the corporation will be \$19,750, which is more than \$3,000 in excess of the surplus. It therefore appears from the statement made by the defendants themselves and attached to the bill of complaint that the proposed purchase of stock would violate this provision

or statutory provisions, purchase the same stock, provided it acts in good faith and is not involved in an attempt to dissolve, and provided such purchase is not prohibited as the rights of its creditors or stockholders." It also there called attention to the fact that in England and in many of the states such action is illegal under all circumstances and not permitted. This subject is now controlled in this state by statute, Section 137.6 of the General Corporation Act, Chapter 32 of the Ill. Rev. Stat. 1941, providing:

"A corporation shall have power to purchase, take, receive, or otherwise acquire, hold, sell, lease, transfer, or otherwise dispose of its own shares, provided that it shall not purchase either directly or indirectly, its own shares when its net assets are less than the sum of its stated capital, its paid-in surplus, any surplus arising from and added to the corporation in value or revaluation of its assets and any surplus arising from surplus to the corporation of any of its shares, or when by so doing its net assets would be reduced below such sum."

In the Illinois Business Corporation Act annotated,

§ 6, page 32, the language of the statute is explained as follows:

"The General rule established in this section is equivalent in most cases to the rule that the shares of a corporation's own shares may be taken only 'out of' earned surplus. Because of the difficulty in forming an absolute definition of 'earned surplus,' the rule was stated indirectly, 'the net assets must be greater than the sum of its stated capital, its paid-in surplus, any surplus arising from and added to the corporation in value or revaluation of its assets and any surplus arising from surplus to the corporation of any of its shares.'"

In this case the complaint states that the stated surplus

is \$12,444.82. It also appears that in the proposed exchange the amount available for the purchase of shares of the corporation will be \$17,750, which is more than \$5,305.18 of the surplus. It therefore appears from the statement made by the defendant's representatives and attached to the bill of complaint that the proposed purchase of stock would violate this provision

of §6 of the law.

The general rule is that the partial invalidity of a proposition of this kind vitiates the entire transaction. As was said in American Credit and Trust Co. v. New Era Chandelier Company, and Chicago Bonding and Surety Co., 208 Ill. App. 181: "*** It is the general rule of law that any part of an entire consideration for a promise or any part of an entire promise being illegal, whether by statute or common law, the whole contract is void ***."

To the same effect are Lyons v. Schanbacher, 316 Ill. 569; Pierce v. Shay, 145 Ill. App. 612; Evans v. American Strawboard Co., 114 Ill. App. 450.

Section 5 (h) of the Illinois Business Corporation Act grants to corporations generally the power to borrow money for its corporate purposes. Under the facts as stated in this bill we think it very doubtful whether the negotiation of this loan could be said (construing it strictly) to be for corporate purposes.

However, it is not necessary to decide all these questions. The injunction is only temporary and maintains the status pending a decision upon the merits. We hold that the court in its discretion might well maintain the status until the case has been heard, and that is all this injunction does. The order will be affirmed.

AFFIRMED.

McSurely, P. J., and O'Connor, J., concur.

of 16 of the law.

The general rule is that the partial invalidity of a

proposition of this kind vitiate the entire transaction.

was said in American Credit and Trust Co. v. New York

Guaranty and Chicago Banking and Safety Co., 98 Ill. App. 111:

"*** It is the general rule of law that any part of an entire

consideration for a promise or any part of an entire promise

being illegal, whether by statute or common law, the whole con-

tract is void ***."

to the same effect see Illinois v. Schenck, 115 Ill.

85; Pierce v. Gray, 145 Ill. App. 415; Pierce v. Schenck

Bank Co., 114 Ill. App. 420.

Section 5 (a) of the Illinois Business Corporation Act

grants to corporations generally the power to borrow money for

its corporate purposes. When the facts are stated in this bill

we think it very doubtful whether the negotiation of this loan

could be said (constructing it strictly) to be for corporate pur-

poses.

However, it is not necessary to decide all these ques-

tions. The injunction is only temporary and maintains the status

pending a decision upon the merits. We hold that the court in

its decision might well maintain the status until the case has

been heard, and that is all this injunction does. The order will

be affirmed.

ATTORNEYS.

Attorneys, P. H. and O'Connor, J. J. O'Connor.

IN THE APPELLATE COURT OF ILLINOIS
SECOND DISTRICT
OCTOBER TERM, 1941

JEAN H. WAXENBERG,

APPELLANT,

vs.

ETHEL G. BROWN, ET AL.,

(MICHELL, ALLEN, MATTHEW

& JORDAN, and DAVID J. PIFFERS,

APPELLEES)

APPEAL FROM THE CIRCUIT
COURT OF KANE COUNTY.

313 I.A. 267²

HUFFMAN, P. J.

Appellees at the instance of appellant filed a bill in 1933, to construe the will of appellant's mother. Subsequently, one of the heirs, Nathan Ginsberg, filed his cross-bill in April, 1936, for the same relief. Thereafter, on motion of Jean H. Waxenberg on March 1, 1938, her bill was dismissed. The case was later tried on the cross-bill of Nathan Ginsberg. An appeal was prosecuted to this court from the decree in that case, wherein that part of the decree construing the will was affirmed, and that part of the decree which allowed attorneys fees to Nathan Ginsberg and reserved jurisdiction of the case for the allowance of further attorney fees was reversed. (299 Ill. App. 225).

The case now before this court concerns an allowance of attorney fees to appellees, and against appellant, for services in connection with the bringing of her suit to construe the will.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

WILLIAM H. HARRIS, Plaintiff,

vs.

JOHN F. HARRIS, Defendant.

COMES NOW the Plaintiff,

and

states that the Defendant,

has been guilty of

violating the laws of the United States

in the following manner:

That the Defendant,

has been guilty of

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JOHN F. HARRIS,

Defendant, in the following manner:

That the Defendant, in the year 1933, he committed the will of the Defendant's

one of the laws, which, filed his name will in 1933,

1933, for the same will. Therefore, he is guilty of

violating the laws of the United States, and

has been guilty of the same will in the year 1933, and

has been guilty of the same will in the year 1933, and

has been guilty of the same will in the year 1933, and

has been guilty of the same will in the year 1933, and

has been guilty of the same will in the year 1933, and

has been guilty of the same will in the year 1933, and

has been guilty of the same will in the year 1933, and

has been guilty of the same will in the year 1933, and

has been guilty of the same will in the year 1933, and

On January 21, 1941, the court entered its order awarding the attorney fees in question, against appellant. It is from this order that appellant prosecutes this appeal.

It appears that appellant had requested appellees to dismiss her suit subsequent to the filing of the cross-bill of Nathan Ginsberg, which sought the same relief; that such action was not taken by appellees, and that Mrs. Waxenberg appeared in court in person and procured the dismissal of her suit. It further appears that the cross-complainant, Nathan Ginsberg, consented thereto. It is generally considered that a complainant or plaintiff has the right to dismiss his bill on his own motion at any time before final decree. *Purdy v. Henslee*, 97 Ill. 389; *Gage v. Bailey*, 119 Ill. 539; *Blair v. Reading*, 99 Ill. 600; *Reilly v. Reilly*, 139 Ill. 180; *Langlois v. Matthissen*, 155 Ill. 230; *Paltzer v. Johnston*, 213 Ill. 338; *Fischheimer v. Kupersmith*, 258 Ill. 392; *Whitaker v. Irons*, 300 Ill. 254; *Schaller v. Huse*, 330 Ill. 345. The cross-complainant consenting to such action on the part of appellant disposed of the rule with respect to such dismissal when a cross-bill had been filed.

It is generally considered that where a will is so ambiguous as to require resort to a court of chancery to obtain a construction of its terms, the costs of such litigation should be born by the estate. *Missionary Society v. Mead*, 131 Ill. 338; *Ingraham v. id*, 169 Ill. 432; *Arnold v. Alden*, 173 Ill. 229; *Wilson v. Clayburgh*, 215 Ill. 506; *Kendall v. Taylor*, 245 Ill. 617; *Keys v. Wohlgenuth*, 240 Ill. 586; *Guerin v. id*, 270 Ill. 239; *Ward v. Caverly*, 276 Ill. 416; *Alford v. Bennett*, 279 Ill. 375. However, it was held by this court with respect to the attorney fee sought to be recovered by Nathan Ginsberg (299 Ill. App. 225) that he had no present interest under the will, and in filing his cross-bill to construe the same, he was seeking personal gain only, and

Under that question answered the counsel
attorney fees in question, without question, it is from the
In January 21, 1941, the boat arrived in Cuba loaded 222

IT supports our reputation and research objectives in this

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pursuant to the rule announced in *Brumsey v. id*, 351 Ill. 414, 427, payment of solicitor's fees to such cross-complainant was improper when the court found such litigant to have no present interest under the will, and therefore no interest in its construction.

The court is of the opinion that the chancellor erred in awarding the attorney fees herein to appellees and against appellant. The control of her action remained with her as plaintiff, and she had the right to abandon and dismiss same. Any obligation on the part of appellant to appellees for legal services would appear to be no different from such situation as might exist generally between a client and attorney.

The judgment herein is reversed.

Judgment reversed.

pursuant to the rule announced in *Tracy v. B.*, 351 Ill. 415, 437, payment of solicitor's fees to such cross-complainant was improper when the court found such plaintiff to have no present interest under the will, and therefore no interest in the estate.

The court is of the opinion that the chancellor erred in awarding the attorney fees herein to appellant and against appellee. The control of her action remained with her plaintiff, and she had the right to abandon and discontinue the litigation on the part of appellant to appelles for legal services which appear to be no different from such litigation as might exist generally between a client and attorney.

The judgment herein is reversed.

Judgment reversed.

OCTOBER TERM, 1941

APPELLEES.

))))))

COURT OF DuPAGE COUNTY.

The court is of the opinion that a freehold is involved in this litigation. As stated in the case of Lennartz v. Boddie,

IN THE DISTRICT COURT OF THE UNITED STATES
SECOND DISTRICT
COLUMBIA TERR., 1916

3181.A.288

APPEAL FROM THE CIRCUIT

COURT OF DISTRICT COLUMBIA.

MARIA E. NORMAN,
APPELLANT,
vs.
WALTER P. ORRILL, et al.,
A PLEASANT.

NORMAN, E. J.

Appellant was seized in two samples of certain real estate. She married William O. Norman. Both parties had been previously married. Following their marriage, appellant and Mr. Norman executed two warranty deeds to Robert P. Orsmond to the real estate owned by appellant. The said Orsmond and wife subsequently conveyed the same to Mr. Norman. Subsequently, he executed his will whereby he devised certain of the lands to his children by a former marriage. Following the death of Mr. Norman, appellant brought this action to set aside and cancel the deeds to the land in question, alleging they were obtained from her by fraud and deceit. The chancellor dismissed the complaint for want of equity. The plaintiff below has brought this appeal. The court is of the opinion that a writ should be issued in this litigation. As stated in the case of *Norman v. Orsmond*,

304 Ill. 484, at page 487, "A freehold is involved in all cases where the necessary result of the judgment or decree is that one party gains and the other loses a freehold estate, and also in cases where the title to a freehold is so put in issue by the pleadings that the decision of the case necessarily involves a decision of such issue." To the same effect are *City of Chicago v. C. B. & Q. R. R. Co.*, 319 Ill. 351; *Christie v. Sanitary District*, 330 Ill. 558; *Lederer v. Rosenston*, 329 Ill. 89; *Sobszenski v. Sobieski Building Ass'n.*, 327 Ill. 47; *Stolowski v. Wierzbowski*, 322 Ill. 74, and *Duncanson v. Lill*, 322 Ill. 528.

A suit to set aside and cancel a deed from a plaintiff upon the ground of fraud, involves a freehold, and an appeal from a decree therein lies directly to the Supreme Court. *Hursen v. id*, 209 Ill. 466 (reported upon subsequent hearing in 212 Ill. 377). The foregoing case is cited with approval in *Litwin v. id*, 375 Ill. 90, 92.

The complaint in this suit seeks to set aside warranty deeds executed by plaintiff to land of which she was seized in fee simple. The necessary result of this suit is that either the defendants will get title to certain of said premises to the exclusion of plaintiff, or that plaintiff will obtain title thereto by cancellation of her deeds, which will divest defendants of their title. Therefore, a freehold is involved, and the appeal should have been taken directly to the Supreme Court. Under such circumstances, it is the duty of this court to transfer the cause. *Feitler v. Dobbins*, 263 Ill. 78, 80; *McComb v. id*, 238 Ill. 555, 556; Sec. 86 of the Practice Act (Ch. 110, sec. 210, Ill. St. 1941).

Pursuant to rule under such circumstances, and the provisions of the above section of the Practice Act, this cause

304 Ill. 431, at page 437, "A decree is entered in the
 cases where the necessary result of the judgment is to
 is that one party gains and the other loses a thing of value,
 and also in cases where the right to a thing is in issue
 issue by the pleadings, and the resolution of the case necessarily
 involves a declaration of legal rights." In the same case
 the City of Chicago v. C. & N. W. Ry. Co., 311 Ill. 511.
 Christie v. Sanitary District, 303 Ill. 551; and in
 aton, 329 Ill. 59; Foxworth v. Foxworth, 327 Ill. 527.
 Ill. 47; Foxworth v. Foxworth, 325 Ill. 54; and Foxworth
 v. Ill. 323 Ill. 523.

A suit to set aside the deed of a party from a third party
 upon the ground of fraud, is a bill in equity, and an appeal
 from a decree thereon lies directly to the Supreme Court.
 Huron v. Id., 309 Ill. 433 (reversed, 309 Ill. 433).
 in 318 Ill. 377. The foregoing case is cited with approval
 in Lattin v. Id., 315 Ill. 32.

The complaint in this case is in equity, and the
 decree executed by plaintiff is a bill in equity, and an appeal
 lies thereon. The necessary result of the judgment is to
 either the defendant will be entitled to the thing of value
 to the exclusion of plaintiff, or the plaintiff will obtain
 title to the thing of value, or the defendant will be
 defendant of the thing. Therefore, a decree is to be entered,
 and the appeal must have been taken directly to the Supreme
 Court. Under such circumstances, it is the duty of this court
 to transfer the case. Huron v. Id., 309 Ill. 433; 309
 McCown v. Id., 325 Ill. 525; 325 Ill. 525; and the parties are
 (Ch. 110, sec. 111, 112, 113).

transferred to the court which originally heard the pro-
 vision of the above section of the Practice Act, this court

is ordered transferred to the Supreme Court, and the Clerk of this court is directed to transmit the transcript and all files in said cause to the clerk of that court.

Cause transferred.

is ordered transferred to the Superior Court and the Clerk
of this court is directed to transmit the transcript and all
files in said case to the Clerk of said court.

James W. Harrison.

IN THE APPELLATE COURT OF ILLINOIS
SECOND DISTRICT
OCTOBER TERM, 1941

TOWN OF THE CITY OF GALESBURG,)
KNOX COUNTY, ILLINOIS,)
APPELLEE,)

vs.)

TOWN OF KEWANEE, HENRY COUNTY,)
ILLINOIS,)
APPELLANT.)

APPEAL FROM THE CIRCUIT
COURT OF HENRY COUNTY.

313 I.A. 268²

HUFFMAN, P. J.

This is a suit by appellee against appellant to recover for money expended by appellee in and about the relief of John W. Bergstrom and family. He was a soldier in the first World War.

Appellant filed answer admitting the allegations of the complaint, and setting up as a defense that appellee made no special levy for the relief of indigent war veterans for the time in question, under the Bogardus act (Ch. 23, sec. 154, et seq. Ill. Statute 1941). Appellant denied liability for the assistance furnished to the pauper by appellee under the general statute enacted for the relief of the poor and needy. Appellant filed counterclaim for \$103.40 already paid to appellee for assistance furnished the individual and his family, during the time before appellant knew the pauper was a war veteran.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

WILLIAM H. HARRIS, JR.

Plaintiff

TOWN OF THE CITY OF BIRMINGHAM,

KNOX COUNTY, ALABAMA,

Defendant.

vs.

TOWN OF FARMINGTON, KNOX COUNTY,

ALABAMA,

Plaintiffs.

WILLIAM H. HARRIS, JR.

Plaintiff

3181A.268

HARRIS, W. H.

This is a bill by plaintiff against defendant to recover for money expended by plaintiff in and about the relief of the W. H. HARRIS and family. The bill is filed in the first year of the year.

Appellant filed answer, admitting the allegations of the complaint, and setting up as a defense that appellee was on special leave for the relief of the plaintiff and was not on duty at the time in question, under the provisions of Act No. 22, Chap. 104, of the Code of Alabama (1901). Appellant denied liability for the assistance furnished to the plaintiff by appellee under the special statute enacted for the relief of the plaintiff and family. Appellant filed complaint for \$100.00 against the plaintiff and family, stating the assistance furnished the plaintiff and family under the special statute enacted for the relief of the plaintiff and family was a violation of the law.

Appellee filed its motion to strike appellant's answer and counterclaim. The motion was sustained. Appellant elected to stand by its answer, and judgment was entered for appellee and against appellant in the sum of \$150.26.

The sole question presented by this appeal is whether the Bogardus act is a defense to appellee's claim. The case of *People v. Mills Novelty Co.*, 357 Ill. 285, appears to be decisive of this point. The court in that case, in considering the Bogardus act, states on page 294, that such act does not prohibit a person who might be entitled to benefits thereunder from also obtaining benefits under the general statutes enacted for the relief of the poor.

The answer of appellant further set up that the American Legion, nor any other military organization in appellee town, had made any attempt to comply with the provisions of the above act so as to put it in operation. The act is not mandatory but merely provides a manner or method by which a post of any one of several designated veteran's organizations may cooperate with the overseer of the poor in the furnishing of relief to those enumerated in such act.

The court is not of the opinion that the answer set forth a good defense. The judgment is therefore affirmed.

Judgment affirmed.

Appellant filed its motion to strike appellee's answer and counterclaim. The motion was sustained. Appellant's motion to stand by its answer, and judgment was entered for appellee with appeal's appeal in the sum of \$100.00.

The sole question presented by this appeal is whether the

respondent is a donee of appellee's estate. The case of *People v. John H. H. Co., 337 Ill. 255*, appears to be decisive of this point. The court in that case, in considering the respondent's motion to stand by its answer, stated on page 255, that when it does not prohibit a person who might be entitled to benefits thereunder from also obtaining benefits under the general statutes enacted for the relief of the poor.

The answer of appellant further set up that the respondent, nor any other literary organization in appellant's case, had made any attempt to comply with the provisions of the above act so as to put it in operation. The act is not mandatory but merely provides a manner or method by which a part of any of several designated revenues or amounts may be contributed to the overhead of the poor in the financing of relief or other purposes in each act.

The court is not of the opinion that the answer and counterclaim are defective. The judgment is therefore affirmed.

81.25

Abstract

Gen. No. 9692.

Ag. No. 6.

63
563

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

OCTOBER TERM, A. D. 1941.

JOSEPH KUHAJDA, JR.,
 (Plaintiff)--Appellee,
vs.
THE CHICAGO, ROCK ISLAND AND
 PACIFIC RAILWAY COMPANY,
 (Defendant)--Appellant.)

313 I.A. 269'

Appeal from
Circuit Court,
Will County.

WOLFE,-- J.

The Chicago, Rock Island and Pacific Railway tracks run practically due east and west through the City of Joliet. The Elgin, Joliet and Eastern Railroad tracks, known as the J, runs nearly north and south through said city and crosses the Rock Island tracks. Connecting the two tracks, there is a transfer track used in changing cars from one railroad to the other. This track

Appellee filed its motion to strike appellee's answer and counterclaim. The motion was sustained. Appellee's answer to stand by its answer, and judgment was entered for appellee and against appellee in the sum of \$100.00.

The sole question presented by this appeal is whether the

lower court is a referee in appellee's claim. The case of *People v. Little Rock City*, 337 Ill. 285, appears to be decisive of this point. The court in that case, in considering the question, stated on page 285, that such act does not constitute a person who might be entitled to constitute a partner from also obtaining benefits under the general statutes enacted for the relief of the poor.

The answer of appellee further set up that the appellee Legion, nor any other military organization in appellee's town, had made any attempt to comply with the provisions of the above act as to put it in operation. The act is not mandatory but merely provides a manner or method by which a part of any one of several designated persons or organizations may cooperate with the overseer of the poor in the furnishing of relief to those in need in such act.

The court is not of the opinion that the answer set up by

appellee is immaterial. The judgment is therefore affirmed.
Affirmed.

Gen. No. 9692.

Ag. No. 6.

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

OCTOBER TERM, A. D. 1941.

JOSEPH KUHAJDA, JR.,
(Plaintiff)--Appellee,
vs.
THE CHICAGO, ROCK ISLAND AND
PACIFIC RAILWAY COMPANY,
(Defendant)--Appellant.)

313 I.A. 269'

Appeal from
Circuit Court,
Will County.

WOLFE,-- J.

The Chicago, Rock Island and Pacific Railway tracks run practically due east and west through the City of Joliet. The Elgin, Joliet and Eastern Railroad tracks, known as the J, runs nearly north and south through said city and crosses the Rock Island tracks. Connecting the two tracks, there is a transfer track used in changing cars from one railroad to the other. This track

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IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

OCTOBER TERM, A. D. 1911.

8131A.203

Appeal from
Circuit Court,
Will County.

(JOSEPH HUNALDA, JR.,
(Plaintiff)---Appellee,
(vs.
(THE CHICAGO, ROCK ISLAND AND
(PACIFIC RAILWAY COMPANY,
(Defendant)---Appellant.
(

WOLFE, -- J.

The Chicago, Rock Island and Pacific Railroad tracks run
practically due east and west through the City of Joliet. The
High, Joliet and Eastern Railroad tracks, known as the J. and
nearly north and south through said city and crossing the Rock
Island tracks. Connecting the two tracks, there is a transfer track
used in changing cars from one railroad to the other. This track

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is curved and connects with the Rock Island tracks at a point east of the main crossing of the two railroads and with the J, at a point north of said crossing. At about 12:30 p.m. on August 2, 1928, this track was occupied by a train of 52 freight cars being pushed in a northwesterly direction from the Rock Island yards to the yards of the J, railroad company. This train is commonly called a "cut," and was in charge of a switching crew consisting of Harry McSherry, C. F. Smilie and Patrick J. Murphy. McSherry was the foreman and was posted on the head end, which would be the car fartherest to the northwest. It was his duty to transmit signals to the engineer through C. F. Smilie, who was stationed on top of the train ten or twelve cars distant from McSherry. Smilie would then transmit the signals to the engineer in charge of the train. As this "cut," approached the J, right of way, a J, freight train was pulling out of the yards proceeding in a southerly direction, and it was necessary to stop the "cut," and remain on the transfer track until a right of way was clear on the J, line. At this time Murphy was stationed a short distance north and west from the head car ready to throw the switch and give the signal to McSherry to come ahead with his train.

On Aug. 2, 1928, Joseph Kuhajda, Jr., who was then about twelve years of age, lived with his parents on Henderson Avenue, in the City of Joliet, a short distance from the J, Railroad Freight

is curved and connects with the Rock Island tracks at a point east of the main crossing of the two railroads and with the U. S. point north of said crossing. At about 10:30 P. M. on August 1, 1905, this track was occupied by a train of six freight cars being pulled in a northeasterly direction from the Rock Island yards to the yards of the U. S. Railroad Company. This train is commonly known as "out," and was in charge of a switchman crew consisting of Henry Kestner, C. E. Saffie and Patrick J. Murphy. Kestner was in the lead and was posted on the lead end, which was the one farthest to the northeast. It was his duty to maintain signals to the engineer through C. E. Saffie, who was stationed at the rear of the train and twelve cars distant from the engine. Saffie would then transmit the signals to the engine in order to the engine. As the "out," approached the U. S. right of way, a U. S. freight train was pulling out of the yards proceeding in a southerly direction, and it was necessary to stop the "out," and remain on the transfer track until a right of way was clear of the U. S. line. At this time Murphy was stationed a short distance north and west from the lead car ready to throw the switch and take the train's necessity to come ahead with the train. On August 2, 1905, Joseph J. Murphy, Jr., was not there about twelve yards of the U. S. line and the train was in motion when, in the City of Joliet, a short distance from the U. S. Railroad right

3.

Yard. On this day a friend and companion of Joseph Kuhajda, Jr., Joachim Gerat, a boy of about eleven years of age, came to Joseph's house and they decided they would go swimming at Silver Cliff, a popular swimming hole frequented by boys, located a short distance south of the Rock Island Tracks and east of the right of way of the J, tracks. The boys, in going to the swimming hole, had to wait for the freight train to pass on the J, tracks. They then crossed the J, tracks in a southeasterly direction to the transfer track in question. When they reached the first car, or the head end of the "cut," which was standing on the transfer track, they passed across said transfer track in front of the said first car to the east side and proceeded along the side of the cars. They observed that the "cut," was a long one, since they could not see the engine. They then crawled underneath the couplings of two freight cars. The Gerat boy was first, and was immediately followed by the Kuhajda boy. The Gerat boy got through without mishap and turned to look at the Kuhajda boy who was almost over the tracks, when the train started with a jerk, and a wheel ran over his right leg, which necessitated its amputation between the knee and the ankle. When the Gerat boy saw that his companion was hurt, he ran towards the head of the train and notified a trainman who was standing on the first, or head end box car. This man was McSherry who immediately applied the air brakes, and the train was abruptly stopped.

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that his companion was hurt, he ran towards the head of the train
and notified a trainman who was standing on the track, or near end
box car. This man was McSherry who immediately applied the air
brakes, and the train was abruptly stopped.

4.

On March 16, 1937, Joseph Kuhajda, Jr., started suit against the Chicago, Rock Island Pacific Railway Company for the damage he sustained because of the accident in question. There is only one count in the complaint, and it charges the defendant with wilful and wanton misconduct, the proximate cause of which injured the plaintiff, and it is as follows: "That at the time and place aforesaid plaintiff who was a minor of the age of twelve (12) years was walking on the right of way along the side of said train of cars then and there being operated as aforesaid upon said switch track within the view and hearing of one of the servants of the defendant in charge of said train of cars; that plaintiff was known by defendant's servant to be then and there upon said right of way and intending to cross through the said train of cars from the east to the west side thereof, but defendant, by its servant, aforesaid, then and there wilfully and wantonly, and with utter disregard for the safety of plaintiff, caused and permitted the said train of cars to be suddenly put into motion without sounding any whistle or bell or otherwise warning plaintiff of the movement of said cars, and as a proximate consequence of such wilful and wanton conduct of defendant, plaintiff was thereby injured."

The defendant filed its answer in which it admitted that it was the owner and operator of a railroad in Joliet, Will County,

5.

Illinois, and that it was operating the train in question, and that plaintiff was on the right of way near said train of cars, but denied that the defendant, by his agent or servant in that behalf, knew that the plaintiff was on the said right of way and intended to cross through said train of cars, and denied that the defendant, by its agent or servant, then and there wilfully and wantonly caused and permitted the said train of cars to be suddenly put into motion, and denied that the plaintiff was injured, as a proximate result of the wilful and wanton conduct on the part of the defendant, or its servant or agent.

The case was tried before a jury who found the issues in favor of the plaintiff and assessed his damages at \$10,000.00. At the close of plaintiff's evidence and of all evidence the defendant entered motions to direct a verdict in their favor. The Court denied their motions and marked the instructions, "refused." Judgment was entered on the verdict in favor of the plaintiff in the sum of \$10,000.00. A few days later, the Court granted leave to the defendant to file a motion for a new trial. A written motion was filed and specified many reasons for the same, but the Court overruled this motion. It is from the judgment of \$10,000.00 that this appeal is prosecuted.

Joseph Kuhajda, Jr., and his boyhood friend, Joachim Gerat,

Illinois, and that it was operating the train in question, and that plaintiff was on the right of way near said track at that time, and that the defendant, by his agent or servant in that behalf, knew that the plaintiff was on the said right of way and intended to cross through said right of way, and caused said crossing to be made at its agent or servant, then and there wilfully and knowingly caused and permitted the said train of cars to be run over the said right of way and caused that the plaintiff was injured, as a proximate result of the willful and wanton conduct on the part of the defendant, or his servant or agent.

The case was tried before a jury who found the issues in favor of the plaintiff and assessed his damages at \$10,000.00. The close of plaintiff's evidence was taken and the defendant entered motion to direct a verdict in this favor. The court denied their motion and granted the instruction, which the plaintiff entered on the verdict in favor of the plaintiff. The sum of \$10,000.00. A few days later, the court granted leave to the defendant to file a motion for a new trial. A written motion was filed and specified the reasons for the same, and the court overruled this motion. It is from the judgment of \$10,000.00 that this appeal is presented.

JOSEPH K. ROBERTSON, JR., and his wife, Plaintiffs, vs. JAMES H. ROBERTSON, Defendant.

6.

each testified that, as they came around the northerly end of the "cut," of cars, they saw a man sitting on the east side of the car, (that is, on the northeast side of the car,) with his feet hanging over the side of the car, and with a club in his hand. Kuhajda also stated, that as he and his friend passed the car, the man sitting on the car said: "Boys, are you going swimming." To which Joseph replied, "Yes." They further testified that was the only conversation they had with the man sitting on the car. That the boys did cross the track between two of the defendant's cars, is admitted, but there is a conflict in the testimony as to where they crossed. The plaintiff and his witness claim it was between the first two cars at the northerly end of the track. The defendant's witnesses all insist that it was several car lengths farther towards the southeast.

Joachim Gerat corroborated the plaintiff in stating that the man sitting on the car was at the northeast corner of the car with his feet hanging over and resting upon the ladder on the side of the car. He also stated that this man had a club in his hand.

Harry McSherry was called as a witness on behalf of the defendant. He testified that he was a switch foreman prior to Aug. 2, 1928, and had been continuously since that time; that on that date he was in charge of the train in question. He stated that at no time while the train was stopped on this "cut," preparatory to

each testified that, as they came around the highway and at the "out," of course, they saw a man sitting on the east side of the car, (that is, on the northeast side of the car,) with his feet hanging over the side of the car, and with a club in his hand. The man testified, that as he and his friend passed the car, the man sitting on the car said: "Boys, are you going swimming?" To which Joseph replied, "Yes." They further testified that was the only conversation they had with the man sitting on the car. That the boys did cross the track between two of the defendant's cars, it admitted, but there is a conflict in the testimony as to where they crossed. The plaintiff and his witness claim it was between the first two cars at the northerly end of the track. The defendant's witnesses all insist that it was several car lengths farther towards the southern. Joseph never corroborated the plaintiff's testimony that the man sitting on the car was at the northeast corner of the car with his feet hanging over and resting upon the ladder on the side of the car. He also stated that this man had a club in his hand. Harry McSherry was called as a witness on behalf of the defendant. He testified that he was a witness from a position at Aug. 2, 1927, and had been continuously since that date; that on that date he was in charge of the train in question. He stated that at no time while the train was stopped on this track, preparatory to

going on to the J, tracks, was he sitting on the side of the car with his feet hanging over the side, or on the ladder, but at all times he was sitting on what is commonly called the run way, that runs down the center of the top of the car; that at no time did he see either of the boys in question, until the Gerat boy called to him; "that they had ran over some one;" that he did not have a club in his hand; that as soon as he learned some one had been hurt, he stopped the train by means of an air brake, which was right in front of him. He stated that from the time the train started, that it had moved about the distance of one car length when he heard the boy calling to him; that he immediately stopped the train; that he did not have any intention of injuring any one and had no knowledge whatsoever, that the plaintiff and his companion were intending to crawl through the train.

C. F. Smilie also a witness on behalf of the defendant, testified that he was a switchman, and at the time in question, was working for the Rock Island Company and was on top of the train during the time it was waiting to go upon the J, tracks; that he was about eleven or twelve cars south and east of McSherry; that in his opinion, the train was on the Y for a period of about twenty minutes before the accident happened; that when McSherry stopped the train, he got down off of the car and walked up to where the plaintiff was standing;

going on to the J tracks, was sitting on the side of the car with his feet hanging over the side, on the inside, but at all times he was sitting on what is commonly called the run way, that runs down the center of the top of the car; that at no time did he see either of the boys in question, until the agent boy called to him; "that they had run over some one;" that he did not have a cloth in his hand; that as soon as he learned some one had been hurt, he stopped the train by means of an air brake, which was right in front of him. He stated that from the time the train started, that it had moved about the distance of one car length when he heard the boy calling to him; that he immediately stopped the train; that he did not have any intention of injuring any one and had no knowledge whatsoever, that the plaintiff and his companion were intending to crawl through the train.

C. F. Sullivan also a witness on behalf of the defendant, testified that he was a seafarer, and at the time in question, was working for the Rock Island Company and was on top of the train during the time it was waiting to go upon the J tracks; that he was about eleven or twelve cars down and east of McNulty; that in his opinion, the train was on the V for a period of about twenty minutes before the accident happened; that when McNulty stopped the train, he got down off of the car and walked up to where the plaintiff was standing.

8.

that he was leaning against the west side of about the twelfth or thirteenth car from the head, or north end of the train, and that McSherry was on the first car. He said during the whole time, that he was sitting on the car waiting for it to proceed to the J, tracks he was in plain view of McSherry and that McSherry was sitting on the board, which is called a cat walk which is used to walk from one car to the other; that he did not see McSherry move from that position any time the train was standing there; that when he, (Smilie,) got off of the train, the plaintiff was not over a half a car length from the car on which he had been riding. He further testified that he did not see the boys until after the accident happened.

Patrick J. Murphy testified that he was a member of the crew in charge of the train in question, and was employed by the Rock Island Railway Company; that he was at the switch between four and five car lengths from the north end of the train; that at all this time McSherry was in full view from where he was; that during that time he observed the position of McSherry on the head car; that he was sitting on top of the car in the middle, on the cat walk, as he called it, or the run way; that at no time did he see the boys in question, until after the accident occurred.

Mr. E. A. Vogel testified that he lived in Little Rock, Arkansas, at the time of the hearing; that on Aug. 2, 1928, he was

that he was leaning against the west side of about the twelfth or thirteenth car from the head, or north end of the train, and that McGarry was on the first car. He said during the whole time, that he was sitting on the car waiting for it to proceed to the tracks he was in plain view of McGarry and that McGarry was sitting on the board, which is called a cat walk which is used to walk from one car to the other; that he did not see McGarry move from that position any time the train was standing there; that when he, (Smith), got off of the train, the plaintiff was not over a half a car length from the car on which he had been riding. He further testified that he did not see the boys until after the accident happened.

Patrick J. Murphy testified that he was a member of the crew in charge of the train in question, and was employed by the Rock Island Railway Company; that he was at the switch between four and five car lengths from the north end of the train; that at all this time McGarry was in full view from where he was; that during that time he observed the position of McGarry on the head car; that he was sitting on top of the car in the middle, on the cat walk, as he called it, or the run way; that at no time did he see the boys in question, until after the accident occurred.

Mr. E. A. Vogel testified that he lived in Little Rock, Arkansas, at the time of the hearing; that on April 2, 1928, he was

employed by the Rock Island Railway Company, as a claim adjuster, and was in Joliet with reference to this accident in question; that on August 9, seven days after this accident took place, he had a talk with Joachim Gerat; that he had several conversations with the Gerat boy on or about August 9, 1928; that he went with the Gerat boy to the scene of the accident and had him describe how the accident occurred; that they were accompanied by the injured boy's father and one of his sisters; that the Gerat boy told them that the accident occurred because Joseph caught his foot in the switch stand, and was run over by the head car; that the switch was not thrown from the ground, but thrown from the tower; that they all walked over to the nearest switch stand, and found that no levers connected with this switch, but it had to be thrown by hand; that the Gerat boy then said the accident did not occur that way, but the boys were crawling between the ends of two cars on the "cut," of cars on the transfer track; that the Gerat boy crawled through first, and that Joseph was nearly through when his foot was run over; that they then went to the hospital where the injured boy was confined, and had a talk with him relative to the accident; that the Gerat boy made a statement for him, which was reduced to writing, and signed by the Gerat boy; (that this is defendant's exhibit 1,) that he bought the Gerat boy's lunch and took him home;

employed by the Hook Island Railway Company, as a class of worker, and was in Joliet with reference to this accident in question; that on August 3, seven days after this accident took place, he had a talk with Joseph Gerat; that he had several conversations with the Gerat boy on or about August 3, 1933; that he went with the Gerat boy to the scene of the accident and had him describe how the accident occurred; that they were accompanied by the injured boy's father and one of his sisters; that the Gerat boy told him that the accident occurred because Joseph Gerat was standing on the switch stand, and was run over by the head car; that the switch was not thrown from the ground, but thrown from the tower; that he saw all walked over to the nearest switch stand, and found that it was connected with this switch, but it had to be thrown by hand; that the Gerat boy then said the accident did not occur that way, but the boys were crawling between the ends of the cars on the "out" of cars on the transfer track; that the Gerat boy climbed through first, and that Joseph was next; that when the foot was run over; that they then went to the hospital where the injured boy was confined, and had a talk with him relative to the accident; that the Gerat boy made a statement for him, which was reduced to writing, and signed by the Gerat boy; (that this is defendant's exhibit 1,) that he took the Gerat boy's money and took him home;

10.

that the statement was taken on a portable typewriter; that after the statement was typewritten, the Gerat boy read the statement, and was asked if it was correct. He stated it was, and the boy then signed it.

The above statement was produced and shown to Joachim Gerat while he was testifying. He was asked if the signature to the statement was his, and if he signed the statement. He denied all knowledge of such statement, or that he had ever signed it. At the request of the defendant's attorney, Joachim Gerat, signed a piece of paper with his own signature. The original Exhibit, together with the signature written by the witness, Gerat, have been certified to this Court for inspection. While this Court does not claim to be handwriting experts, we are all of the opinion that the signature of Joachim Gerat, attached to defendant's Exhibit 1, and the signature of Joachim Gerat, attached to defendant's Exhibit 2, were written by one, and the same person.

A reading of this Exhibit 1, discloses that there is no mention made of the fact that they saw anybody on the train, as they went around the north end of it, or that any one on the train talked to them, or saw them at any time before the accident happened.

It will be observed that the complaint charges that plaintiff was known by defendant's servant to be then and there upon said right of way, and intending to cross through said train of

that the statement was taken on a portable typewriter; that after the statement was typewritten, the agent boy read the statement, and was asked if it was correct. He stated it was, and the boy then signed it.

The above statement was produced and shown to Detective [redacted] while he was testifying. He was asked if he had known the defendant was this, and if he signed the statement. He stated all knowledge of such statements, or that he had ever signed it. At the request of the defendant's attorney, Detective [redacted], signed a piece of paper with his own signature. The original exhibit, together with the signature written by the agent, text, have been furnished to this Court for inspection. While this Court does not claim to be handwriting experts, we are all of the opinion that the signature is certainly not, attributed to defendant's Exhibit 1, and the signature of Detective [redacted], signed to defendant's Exhibit 2, were written by one, and/or same person.

A reading of this Exhibit 1, discloses that there is no mention made of the fact that they saw anybody on the train, as they went around the north end of it, or that any one on the train failed to them, or saw them at any time before the accident happened.

It will be observed that the original exhibits that Exhibit 1 was known by defendant's counsel to be true and that upon said right of way, and including the cross through said train of

11.

cars from the east to the west side thereof, but defendant, by its servant aforesaid, then and there wilfully and wantonly, and with utter disregard for the safety of plaintiff, caused and permitted said train of cars to be suddenly put into motion, without sounding any whistle or bell, or otherwise warning said plaintiff of the moving of said cars, and as a proximate consequence of such wilful and wanton conduct of said defendant, the plaintiff was thereby injured. To sustain this judgment, this Court will have to say that Harry McSherry, with full knowledge of the fact that one, or both of these boys were attempting to crawl between two freight cars, deliberately signalled the train to start, and as a result thereof, the boys were injured. From the reading of the evidence in this case, we have come to the conclusion that the verdict of the jury is contrary to the manifest weight of the evidence, and that the judgment cannot stand.

The appellant has assigned error in regard to the instructions given by the trial court. We do not find any reversible error in the plaintiff's given instructions. They also complain of the defendant's refused instruction, which is as follows: "The court instructs the jury that if you believe from a preponderance of the evidence that, at the time and place in question, the servant of the defendant in

cars from the east to the west side tower, the defendant, its servant and said, then and there willfully and wantonly, and with utter disregard for the safety of plaintiff, caused and permitted said train of cars to be pushed into motion, without sounding any whistle or bell, or otherwise warning said plaintiff of the moving of said cars, and as a proximate consequence of such action and action of said defendant, the plaintiff was severely injured. To sustain this burden, this Court will have to say that Harry Mosher, with full knowledge of the fact that both of these boys were attempting to cross between the freight cars, deliberately allowed the train to start, and as a result thereof, the boys were injured. From the reading of the evidence in this case, we have come to the conclusion that the verdict of the jury is contrary to the weight of the evidence, and that the judgment cannot stand.

The question of whether error is shown by the instructions given by the trial court, we do not find any reversal in error in the plaintiff's given instructions. They also contain the defendant's refused instruction, which is as follows: "The court instructs the jury that if you believe from a preponderance of the evidence that at the time and place in question, the servant of the defendant is

12.

charge of the train was not guilty of a particular intention to injure or was not guilty of such wilful and wanton recklessness as would justify a presumption of an intent to injure generally, then you will find the defendant not guilty." This was practically the charge of the plaintiff's complaint, and it was incumbent upon the the plaintiff to prove such facts. While there are other instructions that might cover these points, we think the Court would have been justified in giving this refused instruction.

The judgment of the Trial Court is hereby reversed and the cause is remanded.

Reversed and Remanded.

charge of the train was not guilty of a particular instruction as
 injure or was not guilty of such which was intended as
 would justify a presumption of its intent to injure generally, and
 you will find the defendant not guilty." This was decidedly the
 charge of the plaintiff's complaint, and it was intended to show the
 the plaintiff to prove such intent. While there are other instructions
 that might cover these points, we think the Court would have been

justified in giving this between instructions.

The judgment of the trial Court is hereby reversed and the

case is remanded.

Reversed and remanded.

42174

IDA SCHWAAN,
(Plaintiff)

Appellee,

v.

EUGENE F. SCHWAAN, JR.,
et al.,

Defendants.

EUGENE F. SCHWAAN, JR.,
(Defendant)

Appellant.

INTERLOCUTORY

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

313 I.A. 269²

MR. PRESIDING JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

This is an interlocutory appeal by defendant Eugene F. Schwaan, Jr., from an order appointing a receiver upon a bill for partition. No evidence was heard. The trial court appointed the receiver upon the pleadings.

Plaintiff filed her verified bill for partition on November 7, 1941. It alleges, in substance, as follows: 1. That her husband, Eugene F. Schwaan, Sr., died on September 16, 1939, leaving a will which disposed only of his personal property; that defendant Eugene F. Schwaan, Jr., was appointed by the Probate court of Cook county, Illinois, as executor of the last will and testament of Eugene F. Schwaan, Sr., on December 1, 1939. 2. That the decedent died seized in fee simple of the following intestate property, to-wit: (Here follows legal description.) 3. That plaintiff, the widow of the decedent, became vested with a third interest in the real estate; that defendant Eugene F. Schwaan, Jr. (hereinafter referred to as appellant), as executor, is administering the real estate in accordance with the statute in such case made and provided; that plaintiff, as the widow of the decedent, waived her right of dower in the said real estate by failing to file

ALISA

IN MONTANA
(Plaintiff)

v.

ROBERT F. BOWMAN, JR.
Defendant

ROBERT F. BOWMAN, JR.
(Defendant)

INTERCOMING

FROM THE DISTRICT COURT
OF SALT LAKE COUNTY

CIT. A. 288

NO. 1. PETITION FOR RECOVERY OF THE SAME

This is an introductory paper by defendant Robert F. Bowman, Jr., filed in order to recover a certain sum of money for partition. No evidence was heard. The trial court appointed the receiver upon the petition.

Plaintiff filed her petition with the partition on November 7, 1941. It alleges, in substance, as follows: 1. That her husband, Robert F. Bowman, Jr., died on September 16, 1937, leaving a will which stated half of his personal property; that defendant Robert F. Bowman, Jr., was appointed by the probate court of Cook County, Illinois, as executor of the last will and testament of Robert F. Bowman, Jr., on December 1, 1937. 2. That the decedent died intestate in the state of the following interests: (a) (b) (c) (d) (e) (f) (g) (h) (i) (j) (k) (l) (m) (n) (o) (p) (q) (r) (s) (t) (u) (v) (w) (x) (y) (z) (aa) (ab) (ac) (ad) (ae) (af) (ag) (ah) (ai) (aj) (ak) (al) (am) (an) (ao) (ap) (aq) (ar) (as) (at) (au) (av) (aw) (ax) (ay) (az) (ba) (bb) (bc) (bd) (be) (bf) (bg) (bh) (bi) (bj) (bk) (bl) (bm) (bn) (bo) (bp) (bq) (br) (bs) (bt) (bu) (bv) (bw) (bx) (by) (bz) (ca) (cb) (cc) (cd) (ce) (cf) (cg) (ch) (ci) (cj) (ck) (cl) (cm) (cn) (co) (cp) (cq) (cr) (cs) (ct) (cu) (cv) (cw) (cx) (cy) (cz) (da) (db) (dc) (dd) (de) (df) (dg) (dh) (di) (dj) (dk) (dl) (dm) (dn) (do) (dp) (dq) (dr) (ds) (dt) (du) (dv) (dw) (dx) (dy) (dz) (ea) (eb) (ec) (ed) (ee) (ef) (eg) (eh) (ei) (ej) (ek) (el) (em) (en) (eo) (ep) (eq) (er) (es) (et) (eu) (ev) (ew) (ex) (ey) (ez) (fa) (fb) (fc) (fd) (fe) (ff) (fg) (fh) (fi) (fj) (fk) (fl) (fm) (fn) (fo) (fp) (fq) (fr) (fs) (ft) (fu) (fv) (fw) (fx) (fy) (fz) (ga) (gb) (gc) (gd) (ge) (gf) (gg) (gh) (gi) (gj) (gk) (gl) (gm) (gn) (go) (gp) (gq) (gr) (gs) (gt) (gu) (gv) (gw) (gx) (gy) (gz) (ha) (hb) (hc) (hd) (he) (hf) (hg) (hh) (hi) (hj) (hk) (hl) (hm) (hn) (ho) (hp) (hq) (hr) (hs) (ht) (hu) (hv) (hw) (hx) (hy) (hz) (ia) (ib) (ic) (id) (ie) (if) (ig) (ih) (ii) (ij) (ik) (il) (im) (in) (io) (ip) (iq) (ir) (is) (it) (iu) (iv) (iw) (ix) (iy) (iz) (ja) (jb) (jc) (jd) (je) (jf) (jg) (jh) (ji) (jj) (jk) (jl) (jm) (jn) (jo) (jp) (jq) (jr) (js) (jt) (ju) (jv) (jw) (jx) (jy) (jz) (ka) (kb) (kc) (kd) (ke) (kf) (kg) (kh) (ki) (kj) (kk) (kl) (km) (kn) (ko) (kp) (kq) (kr) (ks) (kt) (ku) (kv) (kw) (kx) (ky) (kz) (la) (lb) (lc) (ld) (le) (lf) (lg) (lh) (li) (lj) (lk) (ll) (lm) (ln) (lo) (lp) (lq) (lr) (ls) (lt) (lu) (lv) (lw) (lx) (ly) (lz) (ma) (mb) (mc) (md) (me) (mf) (mg) (mh) (mi) (mj) (mk) (ml) (mm) (mn) (mo) (mp) (mq) (mr) (ms) (mt) (mu) (mv) (mw) (mx) (my) (mz) (na) (nb) (nc) (nd) (ne) (nf) (ng) (nh) (ni) (nj) (nk) (nl) (nm) (nn) (no) (np) (nq) (nr) (ns) (nt) (nu) (nv) (nw) (nx) (ny) (nz) (oa) (ob) (oc) (od) (oe) (of) (og) (oh) (oi) (oj) (ok) (ol) (om) (on) (oo) (op) (oq) (or) (os) (ot) (ou) (ov) (ow) (ox) (oy) (oz) (pa) (pb) (pc) (pd) (pe) (pf) (pg) (ph) (pi) (pj) (pk) (pl) (pm) (pn) (po) (pp) (pq) (pr) (ps) (pt) (pu) (pv) (pw) (px) (py) (pz) (qa) (qb) (qc) (qd) (qe) (qf) (qg) (qh) (qi) (qj) (qk) (ql) (qm) (qn) (qo) (qp) (qq) (qr) (qs) (qt) (qu) (qv) (qw) (qx) (qy) (qz) (ra) (rb) (rc) (rd) (re) (rf) (rg) (rh) (ri) (rj) (rk) (rl) (rm) (rn) (ro) (rp) (rq) (rr) (rs) (rt) (ru) (rv) (rw) (rx) (ry) (rz) (sa) (sb) (sc) (sd) (se) (sf) (sg) (sh) (si) (sj) (sk) (sl) (sm) (sn) (so) (sp) (sq) (sr) (ss) (st) (su) (sv) (sw) (sx) (sy) (sz) (ta) (tb) (tc) (td) (te) (tf) (tg) (th) (ti) (tj) (tk) (tl) (tm) (tn) (to) (tp) (tq) (tr) (ts) (tt) (tu) (tv) (tw) (tx) (ty) (tz) (ua) (ub) (uc) (ud) (ue) (uf) (ug) (uh) (ui) (uj) (uk) (ul) (um) (un) (uo) (up) (uq) (ur) (us) (ut) (uu) (uv) (uw) (ux) (uy) (uz) (va) (vb) (vc) (vd) (ve) (vf) (vg) (vh) (vi) (vj) (vk) (vl) (vm) (vn) (vo) (vp) (vq) (vr) (vs) (vt) (vu) (vv) (vw) (vx) (vy) (vz) (wa) (wb) (wc) (wd) (we) (wf) (wg) (wh) (wi) (wj) (wk) (wl) (wm) (wn) (wo) (wp) (wq) (wr) (ws) (wt) (wu) (wv) (ww) (wx) (wy) (wz) (xa) (xb) (xc) (xd) (xe) (xf) (xg) (xh) (xi) (xj) (xk) (xl) (xm) (xn) (xo) (xp) (xq) (xr) (xs) (xt) (xu) (xv) (xw) (xx) (xy) (xz) (ya) (yb) (yc) (yd) (ye) (yf) (yg) (yh) (yi) (yj) (yk) (yl) (ym) (yn) (yo) (yp) (yq) (yr) (ys) (yt) (yu) (yv) (yw) (yx) (yy) (yz) (za) (zb) (zc) (zd) (ze) (zf) (zg) (zh) (zi) (zj) (zk) (zl) (zm) (zn) (zo) (zp) (zq) (zr) (zs) (zt) (zu) (zv) (zw) (zx) (zy) (zz)

of record for one year after letters of administration were issued to appellant. 4. That plaintiff, as widow, is entitled to one-third of the real estate, and that the remaining two-thirds is vested in fee simple in the decedent's three children, appellant, Gertrude and Mildred, all married, Gertrude residing in California and Mildred in Germany. 5. That on February 3, 1941, the Probate court granted plaintiff a widow's award of \$1,500, which has never been paid and should be paid in any event out of the proceeds of the sale of the real estate. 6. That the real estate is improved with a two-story brick building, consisting of two stores and four apartments, that all of the space is rented except one store, and that the total aggregate monthly rental is \$285. (Here follows a recital of the names of the tenants and the nature of each tenancy.) 7. That ever since the death of said Eugene F. Schwaan, Sr., appellant has collected the rents from said tenants and has failed to pay to the plaintiff her share of the rents, issues and profits; that appellant should be compelled, by order and decree of the court, to account to the plaintiff for her just share of the same; that a receiver should be appointed pendente lite to collect the rents, issues and profits; that the said tenants, Ben Pollen, Herman Gutman, Hilda Hansen, Waldo Starr and John Doe James, defendants, have no interest in said real estate other than as tenants. 8. That plaintiff has demanded of appellant a settlement according to her rights and interests in and to the said real estate, but that said defendant has failed and refused so to do. 9. That plaintiff is desirous that a partition or division shall be made of the premises between her and appellant, Gertrude and Mildred according to their respective rights, estates and

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that said defendant has failed and refused so to do, 9. That
plaintiff is desirous that a partition or division shall be
made of the premises between her and appellant, Gertrude and
Wilfred according to their respective rights, estates and

interest therein. 10. That she has frequently applied to the said defendants and requested them to come to an equitable division or partition of the above described premises, or in case they cannot agree upon an amicable division, that they join in making a sale of the premises and divide the proceeds thereof, but that the said defendants have refused to enter into any division or sale of the premises. Plaintiff prays for an accounting and distribution of the rents from appellant; that a receiver be appointed pendente lite, with the usual powers of receivers in like cases; that the widow's award allowed to her by order of the Probate court of Cook county in the sum of \$1,500, which remains unpaid, be made a charge or lien upon said real estate and paid out of the proceeds of any sale thereof; that a division and partition of the real estate be made; that in case a partition cannot be made without manifest prejudice to the parties that the same may be sold under the direction of the court and the proceeds thereof distributed between the parties entitled thereto according to their respective rights.

Appellant filed an answer to the bill. As to the allegations in paragraphs 1 to 5, inclusive, of the bill, he raises no issue save that he denies that the widow's award is still owing and that it should be paid out of the proceeds from the sale of the property. He admits the allegations in paragraph 6. As to the allegations in paragraph 7 he admits that the tenants have no interest in the real estate except as tenants, and denies all other allegations. He denies the allegations contained in paragraphs 8 to 10, inclusive. He makes the following "affirmative defenses": That the estate

interest therein, 10. That she has frequently applied to the said defendants and requested them to come to an equitable division or partition of the above described premises, or in case they cannot agree upon an equitable division, that they join in making a sale of the premises and divide the proceeds thereof, but that the said defendants have refused to enter into any division or sale of the premises. Plaintiff prays for an accounting and distribution of the rents from appellants that a receiver be appointed pendente lite, with the usual powers of receivers in like cases; that the widow's award allowed to her by order of the Probate Court of Cook County in the sum of \$1,500, which remains unpaid, be made a charge or lien upon said real estate and paid out of the proceeds of any sale thereof; that a division and partition of the real estate be made; that in case a partition cannot be made without manifest prejudice to the parties that the same may be sold under the direction of the court and the proceeds thereof distributed between the parties entitled thereto according to their respective rights.

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of Eugene F. Schwaan, Sr., is still open and the probate thereof is still pending in the Probate court of Cook county; that on April 4, 1941, upon motion of plaintiff, the Probate court entered an order directing appellant, as executor,, to sell, if necessary, the real estate involved in the partition suit, and out of the proceeds thereof to pay the widow's award, all allowed claims and the cost of administration; that the personal estate of Eugene F. Schwaan, Sr., in appellant's hands as executor is insufficient to pay all allowed claims in the estate, after the payment of the costs and expenses of administration; that unless appellant, as executor, can discover and reclaim additional personal property of the decedent, it may be necessary to sell the real estate; that all holders of allowed claims against the estate have an interest in said real estate, and as such are necessary and indispensable parties to the partition proceeding; that defendant Mildred Schwaan is a citizen of Berlin, Germany, and pursuant to the Trading with the Enemy Act of the United States, her interest falls within the jurisdiction of the Alien Property Custodian, or his successor in office, who is therefore a necessary and indispensable party to this proceeding. Appellant also filed a "counterclaim," which alleges:

1. That Eugene F. Schwaan, Sr., during the time that he was married to the plaintiff was totally blind and incapable of handling his business and financial affairs without relying heavily upon the assistance of others.
2. That said decedent was a man of considerable means, and shortly before his death owned several large bank accounts, in addition to the real estate involved herein; that the income from the real estate alone amounted to approximately \$3,000 a year over and above

of Eugene F. Schwann, Sr., is still open and the probate thereof is still pending in the Probate Court of Cook County; that on April 4, 1941, upon motion of defendant, the Probate Court entered an order directing appellant, as executor, to sell, if necessary, the real estate involved in the partition suit, and out of the proceeds thereof to pay the widow's award, all allowed claims and the cost of administration; that the personal estate of Eugene F. Schwann, Sr., in appellant's hands as executor is insufficient to pay all allowed claims in the estate, after the payment of the costs and expenses of administration; that unless appellant, as executor, can discover and reclaim additional personal property of the decedent, it may be necessary to sell the real estate; that all holders of allowed claims against the estate have an interest in said real estate, and as such are necessary and indispensable parties to the partition proceedings; that defendant Mildred Schwann is a citizen of Berlin, Germany, and pursuant to the Trading with the Enemy Act of the United States, her interest falls within the jurisdiction of the Alien Property Custodian, or his successor in office, who is therefore a necessary and indispensable party to this proceeding. Appellant also filed a "counterclaim," which alleges: 1. That Eugene F. Schwann, Sr., during the time that he was married to the plaintiff was totally blind and incapable of handling his business and financial affairs without relying heavily upon the assistance of others. 2. That said decedent was a man of considerable means, and shortly before his death owned several large bank accounts, in addition to the real estate involved herein; that the income from the real estate alone amounted to approximately \$3,000 a year over and above

taxes and assessments. 3. That in spite of the size of decedent's income and the volume of his personal estate, only \$926.66 was received by appellant as executor; that plaintiff has persistently refused to account to appellant for the balance of decedent's personal estate, and has refused and failed to explain the whereabouts or disposition of the moneys which constituted the income from the said real estate paid by the tenants prior to the death of the decedent. 4. That for several months after the decedent's death, plaintiff collected the rents and income from the said real estate, but failed to render any account or make any division or distribution to appellant or the other heirs of the decedent. 5. That during the time that appellant has been in possession of the said real estate and collected the rents and income therefrom, he has kept an accurate account thereof and has been ready, willing and able to render a true and accurate report thereof at any time. The counterclaimant prays: That the plaintiff render to this court an accounting of all rents and income received or collected by her with respect to the said real estate, both prior to the death of Eugene F. Schwaan, Sr. and since that time; that the court order the plaintiff to pay to appellant as executor such sums as rightfully constitute the personal estate of the decedent, and to pay to appellant and to the other heirs such portions of the rents and income received after the death of the said decedent as rightfully belong to them; that such additional persons be made parties defendant herein as will give the court jurisdiction over all persons having any interest in said real estate; that further action in this case be suspended until appellant as executor can determine whether it will be necessary to sell the said real estate in order to pay claims and expenses in the probate of the estate of

taxes and assessments. 3. That in spite of the state of
decendant's income and the volume of his personal estate, only
\$256.66 was received by appellant as executor; that plaintiff
has persistently refused to account to appellant for the balance
of decendant's personal estate, and has refused and failed to ex-
plain the whereabouts or disposition of the money which consti-
tuted the income from the said real estate paid by the tenants
prior to the death of the decendant. 4. That for several
months after the decendant's death, plaintiff collected the
rents and income from the said real estate, but failed to
render any account or make any division or distribution to
appellant or the other heirs of the decendant. 5. That during
the time that appellant has been in possession of the said real
estate and collected the rents and income therefrom, he has kept
an accurate account thereof and has been ready, willing and able
to render a true and accurate report thereof at any time. The
counterclaimant prays: That the plaintiff render to this court
an accounting of all rents and income received or collected by
her with respect to the said real estate, both prior to the
death of Eugene F. Schuman, Sr. and since that time; that the
court order the plaintiff to pay to appellant as executor such
sums as rightfully constitute the personal estate of the
decendant, and to pay to appellant and to the other heirs such
portions of the rents and income received after the death of
the said decendant as rightfully belong to them; that such addi-
tional persons be made parties defendant herein as will give
the court jurisdiction over all persons having any interest
in the said real estate; that further action in this case be
decreed as executor can determine whether
necessary to sell the said real estate in order
to pay the debts and expenses in the probate of the estate of

Eugene F. Schwaan, Sr. The answer and counterclaim were both verified.

The question presented on this appeal is whether the trial court, upon the pleadings, was justified in appointing a receiver. Appellant contends: "I. There is nothing in the record to justify the trial court in appointing a receiver. * * * The applicant for a receiver must show that the property itself, or the income from it, is in danger of loss from neglect, waste, misconduct or insolvency. The burden rests with the applicant for a receiver to present facts showing the necessity for the appointment. II. A receiver should not be appointed in a partition suit except for clear and impelling reasons." Plaintiff contends: "I. The record contains ample facts to justify the trial Court in appointing a receiver. The rule applicable here is that the Court may appoint a receiver where one joint tenant excludes the other and has collected all of the rents and refuses to account. He has not paid the taxes. Also for the additional reason that there is strong ill will existing between said co-tenants. II. The Court could see from the pleadings and the facts presented by counsel that there were clear and impelling reasons why a receiver should be appointed."

That the appointment of a receiver in a partition proceeding is not a common practice in this State is evident from the fact that neither party to this appeal has cited an Illinois case where a receiver was appointed in a partition proceeding. We have found one, Ames v. Ames, 148 Ill. 321. That case presents unusual facts. From the opinion (pp. 338, 339) it appears that "after a large amount of testimony had been taken and the master in chancery had filed his report, in which he found that it was for the interest of the minors that partition be made or the

Eugene F. Johnson, Jr. The answer and counterclaim were both verified.

The question presented on this appeal is whether the trial court, upon the pleadings, was justified in appointing a receiver. Appellant contends: "1. There is nothing in the record to justify the trial court in appointing a receiver. * * * The applicant for a receiver must show that the property itself, or the income from it, is in danger of loss from neglect, waste, mismanagement or insolvency. The burden rests with the applicant for a receiver to present facts showing the necessity for the appointment. II, A receiver should not be appointed in a partition suit except for clear and compelling reasons." Plaintiff contends: "1. The record contains ample facts to justify the trial Court in appointing a receiver. The rule applicable here is that the Court may appoint a receiver where one joint tenant excludes the other and has collected all of the rents and refuses to account. He has not paid the taxes. Also for the additional reason that there is strong ill will existing between said co-tenants. II. The Court could see from the pleadings and the facts presented by counsel that there were clear and compelling reasons why a receiver should be appointed."

That the appointment of a receiver in a partition proceeding is not a common practice in this State is evident from the fact that neither party to this appeal has cited an Illinois case where a receiver was appointed in a partition proceeding. We have found one, Watts v. Watts, 148 Ill. 351. That case presents unusual facts. From the opinion (pp. 332, 333) it appears that "after a large amount of testimony had been taken and the matter in controversy had filled his report, in which he found that it was for the interest of the minors that partition be made on the

property sold in the ordinary course of law, the court appointed the Chicago Title and Trust Company receiver of the real and personal property of the deceased, including one hundred and eighteen railroad coal cars. The receiver was authorized to operate and conduct the mine, tile works and store, and to rent any part of the real estate," and the receiver was ordered to execute a lease to the adult heirs of the Minonk property during the minority of the minor complainants. The Supreme court reversed the entire decree upon the ground that the Circuit court of Cook county had no right (p. 346) "to step in and oust the probate court of its jurisdiction over the minors' property," and the cause was "remanded, with directions to the circuit court to allow the partition proceedings to proceed in the ordinary manner." In its opinion, the court stated (p. 340): "The appointment of a receiver in a partition proceeding is not of frequent occurrence, but, pending the litigation, we think the law is well settled that the court has ample power, upon a proper showing, to make the appointment. Freeman on Co-tenancy, after discussing the question at some length, (sec. 327,) concludes as follows: 'In partition, the court will appoint a receiver during the pendency of the action, to preserve the complainants from serious loss, when it is shown that they are unable to rent portions of the property, or to collect rent of other portions rented, in consequence of the conduct of the defendant.'" In 47 C. J. 397, it is stated: "The power to appoint a receiver as an incident of the jurisdiction to partition property can, of course, be exercised only by a court of chancery, and the authority to appoint a receiver should be exercised only for cogent reasons and with extreme caution, so that no injury will result to the parties whose rights are for the time being invaded." "The appointment of a receiver to collect rents

property sold in the ordinary course of law, the court appointed the Chicago Title and Trust Company receiver of the real and personal property of the deceased, including one hundred and eighteen railroad coal cars. The receiver was authorized to operate and conduct the mine, the works and store, and to rent any part of the real estate," and the receiver was ordered to execute a lease to the whole heirs of the minor property having the minority of the minor complainants. The supreme court reversed the entire decree upon the ground that the circuit court of Cook county had no right (p. 345) "to step in and oust the trustee court of its jurisdiction over the miners' property," and the cause was "remanded, with directions to the circuit court to allow the partition proceedings to proceed in the ordinary manner." In its opinion, the court stated (p. 340): "The appointment of a receiver in a partition proceeding is not of frequent occurrence, but, pending the litigation, we think the law is well settled that the court has ample power, upon proper showing, to make the appointment. The man on Go-t-hency, after discussing the question at some length (see. 327), concludes as follows: 'In partition, the court will appoint a receiver during the pendency of the action, to preserve the complainants from serious loss, when it is shown that they are unable to rent portions of the property, or to collect rent of other portions rented, in consequence of the conduct of the defendant.' In 47 C. 1. 327, it is stated: 'The power to appoint a receiver as an incident of the jurisdiction to partition property can, of course, be exercised only by a court of equity, and the authority to appoint a receiver should be exercised only for cogent reasons and with extreme caution, so that no injury will result to the parties whose rights are for the time being invaded.' " The appointment of a receiver to collect rents

[in a partition proceeding] pending the proceedings is not, however, authorized where there is nothing to show any real necessity therefor or imminent danger of loss. * * * but if a tenant in possession does not dispute the title, or interfere with his cotenants, it is not proper to appoint a receiver, particularly where it is not averred that the defendant is insolvent." (20 R. C. L. 769.) "Protection and preservation of the property, or the rents and profits thereof, from injury, waste, removal, conversion, or destruction, is a sufficient ground for the appointment of a receiver in an action for partition and is the most common ground for such appointment; and the rule has been frequently applied in the case of mining property." (47 C. J. 398.) Mining property was involved in Ames v. Ames, supra.

From the pleadings the following facts appear: Appellant is the owner of an undivided two-ninths' interest in the property in question. The decedent, in his will disposing of his personal property, named him executor. The will was probated in the Probate court of Cook county and letters testamentary issued to appellant as executor. The only personal estate of the decedent which has come into appellant's hands as executor is \$926.66. There are unpaid claims against the estate and the Probate court has allowed plaintiff a widow's award of \$1,500. The decedent's estate is still in probate and the assets of the estate are insufficient to pay debts and charges of administration. On April 4, 1941 (the instant bill was filed on November 7, 1941), the Probate court directed the executor to sell the real estate if found necessary in order to pay the debts and charges. The building is approximately eighty-five per cent rented and the entire rental is \$285 a month. For several months after the decedent's death plaintiff collected the rents. The executor is now in possession and is

in a partition proceeding, pending the proceeding in law, however, authorized where there is nothing to show any real danger of loss, or injury, or interference with his possession does not dispute the title, or interfere with his cotenants, it is not proper to appoint a receiver, particularly where it is not averred that the defendant is insolvent." (10 R. C. L. 709.) "Protection and preservation of the property, or the rents and profits thereof, from injury, waste, removal, conversion, or destruction, is a sufficient ground for the appointment of a receiver in an action for partition and is the most common ground for such appointment; and this rule has been repeatedly applied in the case of similar property." (47 C. C. 393.) Where property was involved in Anders v. Anders, 111 Ill.

from the pleadings the following facts appear: Appellant is the owner of an undivided two-ninth interest in the property in question. The defendant, in his will disposing of his personal property, named him executor. The will was probated in the probate court of Cook county and letters testamentary issued to appellant as executor. The only personal estate of the decedent which has come into appellant's hands as executor is \$250.00. There are unpaid claims against the estate and the probate court has allowed plaintiff a widow's award of \$1,500. The defendant set it as still in probate and the assets of the estate were insufficient to pay debts and charges of administration. On April 1, 1941 (the instant bill was filed on November 7, 1941), the probate court directed the executor to sell the real estate if found necessary in order to pay the debts and charges. The billing is approximately eighty-five per cent paid and the entire fund is \$235 a month. For several months after the decedent's death plaintiff collected the rents. The executor is now in possession and

collecting the rents. Neither one has rendered an accounting to the other heirs. Appellant says that he has kept an accurate account of his receipts and has at all times been able and willing to render a report thereof. It will be presumed that appellant, as executor, is acting under bond. Plaintiff alleges in her bill that appellant "is administering said intestate real estate in accordance with the Statute in such case made and provided." There is no allegation that he is improperly excluding any of the other owners from the premises or that plaintiff had sought the possession of the premises or any part of them, or that she had been ousted by the executor from the premises. Nor is there any allegation of mismanagement or waste by appellant. In fact, plaintiff alleges that the building is approximately eighty-five per cent rented. There is no allegation that appellant is insolvent and unable to respond in damages, nor that appellant's interest in the property is not sufficient security for plaintiff's interest in the rents which have been collected. Appellant concedes that he has not accounted to plaintiff for her share of the rents, but plaintiff makes no allegation that she had ever asked appellant to account for her share of the rents. Appellant alleges that plaintiff collected the rents for several months after decedent's death and has not accounted to the other owners for the same, and appellant contends that until plaintiff accounts for the rents she collected he has no way of knowing what is her rightful share in the moneys he has collected, and he alleges in his pleadings that he "has kept an accurate account thereof and has been ready, willing and able to render a true and accurate report thereof at any time."

In support of the order appointing the receiver counsel

collecting the rents. Neither one has rendered an accounting to the other heirs. Appellant says that he has kept an accurate account of his receipts and has at all times been able and willing to render a report thereof. It will be presumed that appellant, as executor, is acting under bond. Plaintiff alleges in her bill that appellant "is administering said intestate real estate in accordance with the statute in such case made and provided." There is no allegation that he is improperly excluding any of the other owners from the premises or that plaintiff had sought the possession of the premises or any part of them, or that she had been ousted by the executor from the premises. Nor is there any allegation of mismanagement or waste by appellant. In fact, plaintiff alleges that the building is approximately eighty-five per cent rented. There is no allegation that appellant is insolvent and unable to respond in damages, nor that appellant's interest in the property is not sufficient security for plaintiff's interest in the rents which have been collected. Appellant contends that he has not accounted to plaintiff for her share of the rents, but plaintiff asks no allegation that she had ever asked appellant to account for her share of the rents. Appellant alleges that plaintiff collected the rents for several months after intestate's death and has not accounted to the other owners for the same, and appellant contends that until plaintiff accounts for the rents she collected he has no way of knowing what is her fractional share in the monies he has collected, and he alleges in his pleadings that he "has kept an accurate account thereof and has been ready, willing and able to render a true and accurate report thereof at any time."

In support of his claim appointing the receiver counsel

for plaintiff have made statements of alleged facts that are not based upon any allegations in the pleadings. This is not a commendable practice and does not aid plaintiff's cause. Plaintiff's counsel argue that appellant has not fulfilled his duties as executor in the Probate court proceedings and that he has not complied with orders of the Probate court. This argument is not warranted by the pleadings, but even if the charge were true, the proper place to make it is the Probate court.

We find that the order appointing a receiver was not warranted by the allegations of the pleadings and we see no good reason why the property in the instant case should be burdened with the costs incident to a receivership.

The interlocutory order of the Superior court of Cook county appointing a receiver is reversed.

INTERLOCUTORY ORDER APPOINTING
RECEIVER REVERSED.

Sullivan and Friend, JJ., concur.

for plaintiff have made statements of alleged facts that are not based upon any allegations in the pleadings. This is not a commendable practice and does not aid plaintiff's cause. Plaintiff's counsel argues that defendant has not fulfilled its entire obligation in the Probate Court proceedings and that he has not complied with orders of the Probate Court. This argument is not warranted by the pleadings, nor even if the facts were true. The proper place to make it is in the Probate Court. We find that the order appointing a receiver was not warranted by the allegations of the pleadings and we see no good reason why the property in the instant case should be sequestered with the estate incident to a receivership. The interlocutory order of the Superior Court of Cook County appointing a receiver is reversed.

REVEREND JUSTICE
JULIUS A. ROYCE

William and Ethel, et al., versus

Abstract

STATE OF ILLINOIS
APPELLATE COURT
THIRD DISTRICT.

313 Ill. App.
4th. P. 1.3
4-142
FEBRUARY
October Term, A.D. 1942.

Gen. No. 9304.

Agenda No. 9.

Carl G. Strawn,
Plaintiff-Appellee,

-vs-

Harold Perbix,
Defendant-Appellant.

Appeal from

County Court

Morgan County.

Fulton J:

313 I.A. 351

67

On Sunday, November 19, 1939, Evelyn Strawn, wife of the Plaintiff-Appellee, Carl G. Strawn, while driving south on Southeast Street in the City of Jacksonville, in her husbands car, came in contact with the car of the Defendant-Appellant, and the right front fender and running board of Appellee's car was damaged as a result of such collision.

Suit was started by Appellee against Appellant in a Justice of the Peace Court where judgment was entered in favor of the Appellant.

On appeal the case was tried in the County Court of Morgan County, without a jury, where a finding and judgment was entered against the Appellant for the sum of \$32.00, and costs of suit. From that judgment Appellant has perfected an appeal to this Court.

The witnesses for Appellee, consisting of his wife who was driving the car, a young girl who was riding in the front seat of her car, and one Ruth Strowmat who was on her front porch across the street from the scene of the accident, testified that the car of the Appellant was parked on the west side of

Abstract

5138
10.10.12
4-445

STATE OF
NEW YORK
IN SENATE
JANUARY 10, 1912

REPORT OF
THE
COMMISSIONERS OF
THE LAND OFFICE
IN RESPONSE TO
RESOLUTION PASSED
JUNE 10, 1909

REPORT OF
THE
COMMISSIONERS OF
THE LAND OFFICE
IN RESPONSE TO
RESOLUTION PASSED
JUNE 10, 1909

1812-1813

Section 1:

The Commission of the Land Office, created by Chapter 122 of the Laws of 1909, has the honor to submit herewith its report for the first year of its existence. It is a pleasure to state that the Commission has been able to carry out its duties in accordance with the provisions of the enabling legislation. The Commission has been organized on January 1, 1910, and has since that time been engaged in a study of the land problem in this State. It has held numerous public hearings and has received many suggestions from the public. It has also conducted extensive research into the various aspects of the land problem, including the ownership of land, the use of land, and the distribution of land. The Commission has found that the land problem in this State is a complex one, involving many different interests and factors. It has endeavored to identify the causes of the problem and to propose effective solutions. The Commission believes that the most important factors in the land problem are the concentration of land in the hands of a few individuals and the inefficient use of land. It proposes to address these issues by implementing certain reforms, including the creation of a public land fund and the establishment of a system of land use planning. The Commission believes that these reforms are essential for the proper management of the State's land resources and for the benefit of the people of this State.

Southeast Street headed south; that a number of automobiles were also parked along that side of the Street by people attending Church services at the Lutheran Church located on the Northwest corner of the intersection of Southeast Street and East Beecher Avenue; that the Appellant came out of the church, got in his car, started it, turned to the left and ran into the front end of the Strawn car as it was passing.

The Appellant testified that when he entered his car, he released his brake and allowed the car to coast down grade against the bumper of the car directly in front of him; that as it moved forward he turned the front end of his automobile slightly outward and while it was in a standing position Mrs. Strawn drove by and collided with the front end of his car. Mrs. Strawn further testified that she was driving carefully at a speed of about 15 miles per hour, which was disputed by witnesses for the Appellant.

There is no question of law involved in this appeal. Appellant insists that Mrs. Strawn was guilty of contributory negligence in not anticipating that cars so parked might at any time be turning into the street. The Appellant gave no signal of any kind of his intention to turn into the street.

The question of contributory negligence is one pre-eminently for the consideration of a jury, as such negligence cannot be defined in exact terms, and unless it can be said that the action of a person is clearly and palpably negligent it is not within the province of the Court to substitute its judgment for that of the jury. *Blumb v. Getz*. 366 Ill. 273.

[illegible]

In Meyer v. Hendrix, 311 Ill. App. 605, the Court said:

"These controverted questions ~~of fact~~ were primarily questions of fact for the trial judge, sitting as a trier of fact, in the absence of a jury. The finding of the trial court judge on the controverted facts is entitled to the same weight as the verdict of a jury. Moore v. David J. Molloy Co., 222 Ill. App. 295. The judgment of that Court who saw the witnesses and heard them testify is conclusive on all questions of fact, if not manifestly against the weight of the evidence."

While the proof in this case is somewhat conflicting, a reading of the entire record discloses ample evidence to sustain the finding of the County Court in favor of the Appellee and the judgment of that Court is affirmed.

AFFIRMED.

In *Meier v. Barmann*, 201 Ill. App. 602, the Court said:

"These controverted matters are not to be
decided by questions of fact for the trial
jury, sitting as a trier of fact, in the
absence of a jury. The finding of the trial
court on the controverted facts is binding
to the same extent as the verdict of a jury.
Moore v. Davis & Hollis Co., 202 Ill. App. 571.
The judgment of that Court who are the
witnesses and hearing testimony is binding
on all questions of fact, if not manifestly
against the weight of the evidence."

While the proof in this case is somewhat conflicting, a
reading of the entire record discloses ample evidence to sustain
the finding of the County Court in favor of the Appellee and the
judgment of that Court is affirmed.

APPROVED.

Abstract

STATE OF ILLINOIS
APPELLATE COURT
THIRD DISTRICT

FEBRUARY
October Term, A.D. 1941.

Gen. No. 9316.

Agenda No. 18.

James Barker
Plaintiff-Appellee,

-vs-

George Geisendorfer,
Defendant-Appellant.

Appeal from

Circuit Court

Pike County.

313 I.A. 351² 69

Fulton J:

The record in this case discloses the following facts:

On the 20th day of February, A.D. 1941, one A.B. Lawson, commenced a suit in the Justice of the Peace Court before the Appellant, George Geisendorfer, a Justice of the Peace in Pittsfield, Illinois, against the Appellee, James Barker. The case was set for trial at eight o'clock A.M. on February 27th, 1941. After one or two short continuances, it was again set for hearing at one o'clock P.M., on that same date. At that hour the Appellee appeared with his attorney, David Williams, and moved for a change of venue, presenting in support thereof the affidavit of the Appellee, James Barker, defendant in that cause, stating that he could not have a fair and impartial trial before the Appellant Geisendorfer. The motion for change of venue was denied by Appellant on the ground that the motion was filed too late because a motion for continuance had theretofore been granted to Appellee Barker.

Admitted

THE CHIEF JUSTICE
APPEALS COURT
THIRD DIVISION

George W. Williams
Appellant

vs.

Gen. No. 2716

James Barker
Plaintiff-Appellee,
-vs-
George W. Williams,
Defendant-Appellant.

James Barker
Plaintiff-Appellee,
-vs-
George W. Williams,
Defendant-Appellant.

3131A.351

Plaintiff 1:

The record in this case discloses the following facts:
On the 20th day of February, A.D. 1941, one A.W. Johnson
commenced a suit in the Justice of the Peace Court before
the Appellate, George W. Williams, a Justice of the Peace
in Pittsfield, Illinois, against the Appellant, James Barker.
The case was set for trial at about 1:00 P.M. on February
27th, 1941. After one of the short adjournments, it was
again set for hearing at one o'clock P.M. on that day.
At that hour the Appellee appeared with his attorney, David
Williams, and moved for a change of venue, presenting in
support thereof the affidavit of the Appellee, James Barker,
deponent in that case, stating that he could not give a
fair and impartial trial before the Appellate. The Appellate
The motion for change of venue was denied on grounds of the
ground that the motion was filed too late to warrant a grant
for continuance and that it had been denied in Appellate
before.

The cause then proceeded to trial and continued into the next day, February 28th. On that date the Justice of the Peace, Appellant here, found in favor of A.B. Lawson, the Plaintiff in that suit, and entered judgment against Appellee for the sum of \$55.00, and costs of suit. Appellee Barker paid the judgment and later started suit against the Appellant Geisendorfer to recover the penalty provided for in Paragraph 36 of the Justice and Constables Act, for refusing change of venue.

On the trial of that case in the Justice Court judgment was rendered in favor of the Appellant George Geisendorfer, and against the Appellee, James Barker, whereupon Barker appealed the case to the Circuit Court of Pike County. The cause was tried in the latter court and resulted in a judgment for the Appellee and against the Appellant, George Geisendorfer, the damages being fixed in the finding of the Court and in the judgment at the sum of \$100.00. It is that judgment which Appellant seeks to reverse by this appeal.

It is the duty of a Justice of the Peace to grant a change of venue where a party to the suit, before the commencement of the trial, makes oath that he cannot have an impartial trial before said Justice of the Peace. Chap. 79. Par. 34, Ill. R.S. 1940, Bar Assn Ed.

A change of venue is a statutory right. People v. Gibbons, 91 Ill. App. 567.

The cause then proceeded in trial and continued into the next day, February 22nd. On that date the question of the issue, appellants have, found in favor of A. B. Brown, the plaintiff in that suit, and returned judgment against appellants for the sum of \$50.00, and costs of suit. Appellants then filed a motion and later moved for judgment against the Appellate Department to reverse the verdict provided for in Paragraph 36 of the Justice and Constitution Act, the refusing of entry of venue.

On the trial of that case in the Justice Court judgment was rendered in favor of the appellant George DeWolfe, and against the appellee, James Brown, respondent. Appellants then appealed the case to the Circuit Court of this County. The cause was tried in the latter court and resulted in a judgment for the appellee and against the appellant, George DeWolfe, the damages being fixed in the finding of the Court and in the judgment at the sum of \$100.00. It is that judgment which appellants seek to reverse by this appeal.

It is the duty of a Justice of the Peace to have a change of venue where a party in the suit, before the commencement of the trial, moves on the ground that he cannot have an impartial trial before said Justice of the Peace. Section 20, Act No. 121, P. S. 1907, has been so.

A change of venue is a statutory right. People v. DeWolfe, 22 Ill. App. 567.

1939
per [signature] 2-17-40
"Any justice of the peace or police magistrate who shall refuse a change of venue in any suit or proceeding instituted and then pending before him, upon the proper application being made as provided for in this act, shall forfeit and pay to the person aggrieved, one hundred dollars, to be recovered by action of debt in any court of competent jurisdiction." Par. 36. Chap. 79. Ill.R.S. 1940, State Bar Assn. Ed.

Appellant insists that the motion for change of venue in the Lawson case was filed too late because a continuance had been granted Barker prior to his application for the change. The case of *Buga v. Martin*, 174 Ill. App. 217, is cited as authority but that opinion sets forth an entirely different situation from the record in this case.

The cases cited in support of the principle that a judicial officer is not answerable in a civil suit for any judicial act within his jurisdiction, however erroneous, to a party aggrieved, were all rendered long prior to the adoption of Par. 36 above quoted.

In this case we believe that the application for change of venue in the Lawson case was made by Appellee in apt time; the affidavit in support of the same was in substantial compliance with the Statute; the Appellee was aggrieved by the refusal of Appellant to grant the change of venue complained of and the action of the Appellant in denying such motion was a clear violation of said Paragraph 36.

All of these issues were proven by satisfactory and convincing evidence and the judgment of the Circuit Court is affirmed.

AFFIRMED.

Any notice of the name of the party who shall receive a license is given in any suit or proceeding instituted and then pending before him, upon the return of the party who shall receive a license, in this suit, shall be liable to the person receiving, and shall be liable to be removed by action of law in any court of competent jurisdiction. (L. 1903, Chap. 17, Sec. 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 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2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2037, 2038, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2046, 2047, 2048, 2049, 2050, 2051, 2052, 2053, 2054, 2055, 2056, 2057, 2058, 2059, 2060, 2061, 2062, 2063, 2064, 2065, 2066, 2067, 2068, 2069, 2070, 2071, 2072, 2073, 2074, 2075, 2076, 2077, 2078, 2079, 2080, 2081, 2082, 2083, 2084, 2085, 2086, 2087, 2088, 2089, 2090, 2091, 2092, 2093, 2094, 2095, 2096, 2097, 2098, 2099, 2100, 2101, 2102, 2103, 2104, 2105, 2106, 2107, 2108, 2109, 2110, 2111, 2112, 2113, 2114, 2115, 2116, 2117, 2118, 2119, 2120, 2121, 2122, 2123, 2124, 2125, 2126, 2127, 2128, 2129, 2130, 2131, 2132, 2133, 2134, 2135, 2136, 2137, 2138, 2139, 2140, 2141, 2142, 2143, 2144, 2145, 2146, 2147, 2148, 2149, 2150, 2151, 2152, 2153, 2154, 2155, 2156, 2157, 2158, 2159, 2160, 2161, 2162, 2163, 2164, 2165, 2166, 2167, 2168, 2169, 2170, 2171, 2172, 2173, 2174, 2175, 2176, 2177, 2178, 2179, 2180, 2181, 2182, 2183, 2184, 2185, 2186, 2187, 2188, 2189, 2190, 2191, 2192, 2193, 2194, 2195, 2196, 2197, 2198, 2199, 2200, 2201, 2202, 2203, 2204, 2205, 2206, 2207, 2208, 2209, 2210, 2211, 2212, 2213, 2214, 2215, 2216, 2217, 2218, 2219, 2220, 2221, 2222, 2223, 2224, 2225, 2226, 2227, 2228, 2229, 2230, 2231, 2232, 2233, 2234, 223

Abstract

STATE OF ILLINOIS
APPELLATE COURT
THIRD DISTRICT

FEBRUARY
~~October~~ Term, A. D., 1941.

General No. 9303.

Agenda No. 8.

MILDRED RENNIE,)
)
Plaintiff Appellee,)
)
-vs-)
)
LOUIS A. HAUFFE,)
)
Defendant Appellant.)

632
Appeal from
Circuit Court,
Logan County.
70

3131.A. 352

RIESS, J.:

Appeal was taken by the defendant, Louis A. Hauffe, from a judgment entered against him and in favor of plaintiff appellee Mildred Rennie in the Circuit Court of Logan County, Illinois. The action sought recovery of damages for personal injuries alleged to have been sustained by the plaintiff appellee while riding as a passenger in an automobile then being driven in a northerly direction on concrete State Highway No. 121 at a point about five miles southeast of Lincoln, Illinois. The above car was proceeding along said highway in the rear of a small pickup truck operated by the defendant Hauffe and being driven by him in the same direction. According to the testimony of the plaintiff, the defendant Hauffe attempted to turn around on the hard road by driving his truck upon the east shoulder of the highway and then to the left across the slab towards the west; that at that time, a third automobile driven by one Bernice Homerin was approaching defendant's truck from the south; that Bernice Homerin, because of the act of the defendant Hauffe, was forced to drive her car with at least two wheels thereof off of the highway on to the wet and slippery west shoulder, and that as a proximate result, she lost

Abstract

STATE OF ILLINOIS
Circuit Court
Third District

Filed for
Record Term, A. D., 1934.

Appeal No. 2.

General No. 2503.

Appeal from
Circuit Court,
Jasper County.

WILLIAM HANLEY,
Plaintiff Appellee,
-vs-
LOUIS A. HANLEY,
Defendant Appellant.

3131A.052

MISS., 11.

Appeal was taken by the defendant, Louis A. Hanley, from a judgment entered against him and in favor of plaintiff appellee, William Hanley, in the Circuit Court of Jasper County, Illinois. The action sought recovery of damages for personal injuries alleged to have been sustained by the plaintiff appellee while riding as a passenger in an automobile then being driven in a northerly direction on concrete State Highway No. 181 at a point about five miles southeast of Lincoln, Illinois. The above car was proceeding along said highway in the rear of a small green motor operated by the defendant Hanley and being driven by him in the same direction. According to the testimony of the plaintiff, the defendant Hanley attempted to turn around on the road by driving his truck upon the east shoulder of the highway and then to the left across the slip concrete for west; that at that time, a third automobile driven by one George Hamilton was approaching defendant's truck from the west; that George Hamilton, because of the act of the defendant Hanley, was forced to drive over the side of the road and was thrown off of the highway on to the east and slightly west shoulder, and that as a result of the accident, the loss

control of her car, causing it to run to the left across the slab into the car in which the plaintiff was riding, resulting in severe injuries to the plaintiff.

The jury returned a verdict for the plaintiff in the sum of seven hundred dollars, and after overruling the motions for a new trial interposed by the defendant, the Court entered judgment on the verdict, from which this appeal is prosecuted.

The cause of action is based on the plaintiff's contention that Louis A. Hauffe, the defendant, suddenly, carelessly and negligently ran and drove his delivery truck across the paved portion of the highway and into the path of the car that was being driven by Bernice Homerin, thereby blocking traffic upon both traffic lanes of said highway, and that as a direct result, Bernice Homerin was forced and compelled to pass around in front of said delivery truck in order to prevent a collision of her automobile, causing her car to skid into the car occupied by the plaintiff and injure her.

The evidence is conflicting on the question of whether or not the Homerin car was forced off of the slab by the defendant in the negligent operation of his truck or whether it left the slab for no apparent reason after it passed his truck. According to the plaintiff's testimony, the car in which she was riding was about one hundred feet to the rear of the truck. She testified that the truck suddenly whirled around on the hard road and that the front end of the truck was very close to her left side of the slab and that it was crosswise on the slab and over the black line; that at that time, the car driven by Bernice Homerin at least partly left the slab to pass around the truck. Bernice Homerin testified that she observed the truck start to make the turn on the highway; that she shifted into second and started to pass him; that at that time the defendant started forward ahead of her and that she was forced to turn out on the shoulder

control of her car, causing it to run to the left across the road into the car in which the plaintiff was riding, resulting in severe injuries to the plaintiff.

The jury returned a verdict for the plaintiff in the sum of seven hundred dollars, and after overruling the motion for a new trial, entered judgment in the verdict, the court entered judgment in the verdict, from which this appeal is prosecuted.

The cause of action is based on the plaintiff's contention that Louis A. Harris, the defendant, negligently and recklessly ran and drove his delivery truck across the road causing the plaintiff to be thrown into the path of the car that was being driven by Bernice Horvick, thereby causing traffic upon both public lanes of said highway, and that as a direct result, Bernice Horvick was forced and compelled to pass around in front of said delivery truck in order to prevent a collision of her automobile, causing her car to slide into the car occupied by the plaintiff and injure her.

The evidence is conflicting on the question of whether or not the defendant car was forced off of the road by the defendant in the negligent operation of his truck or whether it left the road for no apparent reason after it passed the truck. According to the plaintiff's testimony, the car in which the plaintiff was riding was about one hundred feet to the rear of the truck. She testified that the truck suddenly swerved around on the road and that the truck and the car were very close to her left side of the road and that it was impossible on the side and over the black line; that at that time, the car driven by Bernice Horvick to avoid passing left the road to pass around the truck. Bernice Horvick testified that she observed the truck start to move into the highway from the left and that it was forced and compelled to pass him; that she also observed the truck forward ahead of her and that she was forced to turn left on the shoulder

and that as she went out on the shoulder, her car began to skid and swung across the pavement into the automobile occupied by the plaintiff. The witnesses seem to agree that the collision occurred at a point about seventy five to one hundred feet from the truck.

Defendant appellant testified that after he had passed the place where he had intended to stop along the highway, he decided to turn around on the slab and go in the opposite direction; that thereupon he drove off of the slab and made a turn toward the hard road; that he drove to the black line and backed off of the pavement with the front wheels of his car against the edge of the slab and waited until the Homerin car had passed him; that he then turned on to the hard road and followed her; that he saw her car go off the highway on to the shoulder and turn back ~~off~~ the slab and strike the car that had come from the south, which was occupied by the plaintiff.

Whether or not the evidence established the charges of negligence alleged in the complaint became a question of fact for the jury, which was determined adversely to the defendant appellant by its verdict.

The important question presented by the record and argued by counsel is whether the negligence alleged was the proximate cause of the injury to the plaintiff, or whether the collision was not the proximate result of such alleged negligence on the part of the defendant, but was the result of an independent intervening cause, viz: The act of Bernice Homerin in turning back upon the pavement after she had passed in front of the defendant's truck. The rules for determining whether a negligent act or omission is the proximate cause of an injury are well established and have been applied by different courts in numerous cases under differing conditions of fact. The negligent act or omission must be the proximate cause which produces the injury, but it need not be the sole cause nor necessarily the last or nearest cause. It is sufficient if it concurs with some other cause acting at the same time which, in combination with it, causes the injury; or if it sets in

in motion a chain of circumstances and operates on them in a continuous sequence unbroken by any new or independent cause. It is not necessary that the person guilty of a negligent act or omission might have foreseen the precise form of the injury, but when it occurs, it must appear that it was a material and probable consequence of his negligence. The test in determining the question of a proximate cause is whether the person guilty of the first negligent act or omission might have reasonably anticipated the intervening cause as a natural and probable result of his own negligence and if so, the connection between such negligence and the injury is not broken by the intervening cause.

If there is evidence tending to show that the negligence alleged was a proximate cause of the injury, then the matter is one of fact to be submitted to the jury, but the question whether there is any such evidence is one of law for the Trial Judge to decide. In *Lotesto v. Baker*, 246 Ill. App. 425, a plaintiff based his cause of action on the fact that the defendant swerved his car into the path of a truck and that, as a natural consequence, the driver of the truck swerved his truck to the left, thereby injuring the plaintiff. There, as here, it was argued that the negligence of the driver of the automobile was not the proximate cause of the injury; that the intervening act of the driver of the truck was the sole cause of the injury. The Court said (page 431): "In considering the conduct of the defendant, Henikoff, it will be seen that that conduct was in and of itself, according to the evidence for the plaintiff, the direct source of the swerving of the truck, to the left, out of its normal course and of the consequent collision with the plaintiff. When the automobile intercepted the truck it precipitated, almost immediately, the new motions of the truck, which resulted in the collision. The act of the driver of the truck, considering the situation, was entirely dependent upon the action of the defendant Henikoff. It may be true

in action a chain of circumstances and operates on them in a continuous
 sequence broken by any one or independent cause. It is not necessary
 that the person guilty of a negligent act or omission should have fore-
 seen the precise form of the injury, but when it occurs, it must appear
 that it was a material and probable consequence of his negligence. The
 test in ascertaining the question of a proximate cause is whether the
 person guilty of the first negligent act or omission might have reasonably
 anticipated the intervening cause as a material and probable result
 of his own negligence and if so, the connection between such negligence
 and the injury is not broken by the intervening cause.

If there is evidence tending to show that the negligence
 alleged was a proximate cause of the injury, then the matter is one
 of fact to be submitted to the jury, and the question whether there
 is any such evidence is one of law for the trial judge to decide. In
Lozano v. Baker, 236 Ill. App. 2d, a plaintiff sued his aunt of
 action on the fact that the defendant carried his car over the back
 of a truck and that, as a natural consequence, the driver of the truck
 swerved his truck to the left, thereby injuring the plaintiff. There
 as held, it was alleged that the negligence of the driver of the auto-
 mobile was not the proximate cause of the injury; that the intervening
 act of the driver of the truck was the sole cause of the injury. The
 Court said (page 431): "In considering the question of the proximate
 cause, it will be seen that contact was made and the truck,
 according to the evidence for the plaintiff, the driver of the
 truck, to the left, out of the normal course and of
 the consequent collision with the plaintiff. When the automobile
 intercepted the truck it was swerving, almost horizontally, the rear
 portion of the truck, which resulted in the collision. The act of
 the driver of the truck, swerving the automobile, was directly
 dependent upon the action of the defendant's automobile. It may be said

that both the driver of the truck and the defendant, Henikoff, were guilty of negligence, but it does not follow that the negligence of the driver of the truck exonerated the defendant Henikoff, for if the plaintiff was injured by the combined negligence of both parties he would have a cause of action against either or both. St. Louis Bridge Co. v. Miller, 138 Ill. 465."

If the defendant's truck was crossways on the highway, as his witness, Bernice Homerin, testified, and if the defendant moved his truck forward as she was passing in front of his truck, he might have reasonably anticipated that his action would cause her to leave the highway and that she might lose control of her automobile on the wet and slippery shoulder, thereby causing damage to her own car or any other cars which might be driving along the highway. Therefore, the jury was justified in finding that the collision was directly traceable to the negligence of the defendant, as alleged in the complaint.

We hold that the Court was warranted in submitting this question of fact to the jury under the evidence, and the jury was, from the facts and circumstances in evidence, warranted in finding that the connection between the conduct of the defendant and the collision was unbroken and that the proximate cause of the injury was the negligence of the defendant.

It is further insisted that the Court erred in refusing six of the defendant's instructions. All propositions of law were fully covered in sixteen instructions given by the Court on behalf of the defendant. The refused instructions are subject to criticism. It is not proper to instruct the jury that certain facts, some of which are not disputed, do or do not constitute negligence, contributory negligence or proximate cause.

Finding no reversible error in the record, the judgment of the Circuit Court of Logan County is affirmed.

JUDGMENT AFFIRMED.

that both the driver of the truck and the defendant, defendant, were guilty of negligence, and it does not follow that the negligence of the driver of the truck operated the defendant's liability, for if the plaintiff was injured by the combined negligence of both parties he would have a cause of action against either or both. 22. In this regard, Co. v. Miller, 128 Ill. 455.

If the defendant's truck was proceeding on the highway, as his witness, Burton Newman, testified, and if the defendant moved his truck forward as she was passing in front of his truck, he might have reasonably anticipated that his action would cause her to leave the highway and that she might lose control of her automobile on the wet and slippery shoulder, thereby causing damage to her own car or any other car which might be driving along the highway. Therefore, the jury was justified in finding that the collision was directly traceable to the negligence of the defendant, as alleged in the complaint.

It is held that the Court was warranted in submitting this question of fact to the jury upon the evidence, and the jury was, from the facts and circumstances in evidence, warranted in finding that the connection between the action of the defendant and the collision was unbroken and that the proximate cause of the injury was the negligence of the defendant.

It is further held that the Court acted in submitting six of the defendant's instructions. All instructions of law were fully covered in written instructions given by the Court on behalf of the defendant. The relevant instructions are subject to deletion. It is not proper to instruct the jury that certain facts, some of which are not disputed, do not constitute negligence, and that

defendant's negligence or proximate cause. Finding no reversible error in the record, the judgment of the Circuit Court of Logan County is affirmed.

THOMAS W. BROWN.

40958

LOREN D. SEXAUER and ROBERT A.
NELSON, Successor Trustees of
Exchange Sales Corporation,
Appellants and Cross-Appellees,

v.

TRUST COMPANY OF CHICAGO, as
Successor Trustee, under trust
known as Trust No. 3927,
Appellee and Cross-Appellant.

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

313 I.A. 352²

MR. PRESIDING JUSTICE MCSURELY DELIVERED THE OPINION OF THE COURT.

This is an action for an accounting. The principal item in controversy is the claim of Carroll Schendorf & Boenicke, Inc., a real estate agency, for compensation for services and expenses in connection with securing purchasers of apartments in a large cooperative apartment building.

Carroll Schendorf & Boenicke, Inc., operated under that name until June 24, 1931, when its name was changed to Exchange Sales Corporation. Subsequently it made an assignment for the benefit of creditors and the plaintiffs are successor trustees under that assignment.

In 1927 James Carroll, Winfield Schendorf and Meyer Fridstein, as individuals, associated themselves together to build a 98 cooperative apartment building at 5000 East End avenue, Chicago; Carroll and Schendorf were officers of Carroll Schendorf & Boenicke, Inc.; Fridstein was associated with a firm of contractors who built the building. Carroll, Schendorf and Fridstein borrowed money to purchase the land on which the building was to be erected and organized a corporation known as 5000 East End Avenue Building Corporation; 10,000 shares of stock were distributed equally among the three persons in consideration of the transfer to the corporation of the land upon which the building was to be erected. A building loan of \$1,600,000 was negoti-

TRUST COMPANY OF CHICAGO, as
successor trustee, under trust
known as Trust No. 2227,
Appellee and Cross-Appellant,
v.
JAMES D. SCHULTZ and ROBERT A.
WELSON, Successor Trustees of
Exchange Sales Corporation,
Appellants and Cross-Appellees,

VERMONT 1930

CHICAGO 1931

COSE 1932

3131A.332

MR. TRIMMING JUSTICE RECOMMENDS THE GRANT OF THE MOTION.

This is an action for an accounting. The principal item in controversy is the claim of Carroll Schenck & Son, Inc., a real estate agency, for compensation for services and expenses in connection with securing purchase of apartment building in a large cooperative apartment building. Carroll Schenck & Son, Inc., operated under that name until June 24, 1931, when its name was changed to Exchange Sales Corporation. Immediately it made an assignment for the benefit of creditors and the plaintiffs are successor trustees under that assignment. In 1927 James Carroll, Winfield Schenck and Meyer Hydstein, as individuals, associated themselves together to build a 38 cooperative apartment building at 2000 East 2nd Avenue, Chicago; Carroll and Schenck were officers of Carroll Schenck & Son, Inc.; Hydstein was associated with a firm of contractors who built the building. Carroll, Schenck and Hydstein borrowed money to purchase the land on which the building was to be erected and organized a corporation known as 2000 East 2nd Avenue Building Corporation; 10,000 shares of stock were distributed equally among the three persons in consideration of the transfer to the corporation of the land upon which the building was to be erected. A building loan of \$1,000,000 was made to

ated with S. W. Straus & Company. Each apartment had allotted to it a certain number of shares of stock which were to be delivered to the purchaser, together with a proprietary lease when the stock was paid for in full.

January 10, 1928, Fridstein, Carroll and Schendorf, who were operating as a co-partnership with reference to the building, and Carroll Schendorf & Boenicke, Inc., (hereafter called "Boenicke, Inc.") entered into a contract under which the latter was employed as selling agent of apartments and stock of the building corporation, for compensation and terms which were stated in the contract. Boenicke, Inc. was authorized to make leases and had sole and exclusive agency for this purpose, - the agreement to remain in full force and effect until all of the stock was sold or apartments leased. The contract also provided that all its terms and obligations should be binding upon the administrators and assigns of the parties thereto.

When the shares of stock of the building corporation were issued they were deposited in escrow with the Chicago Title & Trust Company, with the proceeds of the sale of the stock. The agreement of January 10, 1928, directed the Chicago Title & Trust Company to pay Boenicke, Inc., its charges out of the first moneys received.

October 1, 1928, the co-partnership of Carroll, Schendorf and Fridstein, who were constructing the building, became involved in financial difficulties, not having sufficient funds to pay the various persons to whom they were indebted for money, materials, etc., including Boenicke, Inc., to whom they were indebted in a substantial amount. On this date a meeting was called of the creditors of this co-partnership at which the situation was discussed for the purpose of finding a method to complete the build-

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ated with E. J. Straus & Company. When the amount was paid to it a certain number of shares of stock which were to be delivered to the purchaser, together with a promissory note which the stock was paid for in full.

January 10, 1928, Friedstein, Garroll and Schenck, who were operating as a co-partnership with reference to the building, and Garroll Schenck & Associates, Inc., (hereinafter called "Schenck, Inc.") entered into a contract under which the latter was employed as selling agent of apartment and stock of the building corporation, for commission and terms which were stated in the contract. Schenck, Inc., was authorized to make loans and had sole and exclusive agency for this purpose, - the agreement to remain in full force and effect until all of the stock was sold or apartments leased. The contract also provided that all its terms and obligations should be binding upon the building corporation and assigns of the parties thereto.

When the shares of stock of the building corporation were issued they were deposited in escrow with the Chicago Title & Trust Company, with the proceeds of the sale of the stock. The agreement of January 10, 1928, stated the Chicago Title & Trust Company to pay Schenck, Inc., the amount due at the first money received.

October 1, 1928, the co-partnership of Garroll, Schenck and Friedstein, who were constructing the building, became involved in financial difficulties, not having sufficient funds to pay the various persons to whom they were indebted for money, materials, etc., including Schenck, Inc., to whom they were indebted in a substantial amount. On this date a meeting was called of the creditors of this co-partnership at which the situation was discussed for the purpose of finding a means to complete the building.

ing and satisfy the creditors. Three attorneys, representing different creditors, were appointed a committee to investigate the situation and formulate a plan of liquidation.

A trust indenture was prepared which was dated December 15, 1928, but was not actually signed by all of the parties until some weeks thereafter. Under this agreement Carroll, Schendorf and Fridstein conveyed to the Foreman Trust & Savings Bank and Morris E. Feiwell, as trustees, certain assets, including the capital stock of the building corporation and proprietary leases and all other interests in moneys, contracts or assets received in exchange for stock previously sold. It also provided that the creditors should receive in exchange for an assignment of their claims to the trustees, debentures of four different classes: A, B, C, and D, - to have priority in the order mentioned. Boenicke, Inc., received class D debentures in the aggregate amount of \$66,763.52. The master to whom the cause was referred found that this amount covered claims due Boenicke, Inc., up to October 1, 1928. The chancellor overruled the master in this respect, finding that the debentures were payments in full to December 15, 1928.

Subsequently the Foreman Trust & Savings Bank ceased to act as trustee, and the American National Bank & Trust Company became a successor trustee. Later the American National Bank and Feiwell resigned as trustees, and the Trust Company of Chicago, representing Carroll, Schendorf and Fridstein (hereafter called defendants), was appointed successor trustee.

Boenicke, Inc., continued to sell apartments in the building after October 1, 1928, advancing various sums for advertising and other expenses until February 15, 1929. The master held that the agreement of January 10, 1928, employing Boenicke, Inc., as exclusive selling agents of the stock and apartments

ing and satisfy the creditors. These attorneys, representing different creditors, were appointed a committee to investigate the situation and formulate a plan of liquidation.

A trust indenture was prepared which was dated December 15, 1928, but was not actually signed by all of the parties until some weeks thereafter. Under this agreement Carroll, Rosenbort and Friedstein conveyed to the Foreman Trust a savings bank and certain assets, including the capital stock of the building corporation and proprietary leases and all other interests in money, contracts or assets received in exchange for stock previously sold. It also provided that the creditors should receive in exchange for an assignment of their claims to the trustees, debentures of four different classes: A, B, C, and D, - to have priority in the order mentioned.

Boenloke, Inc., received class D debentures in the amount of \$68,763.52. The master to whom the same was referred found that this amount covered claims due Boenloke, Inc., up to October 1, 1928. The chancellor overruled the master in this respect, finding that the debentures were payable in full to December 15, 1928.

Independently the Foreman Trust A Savings Bank ceased to act as trustee, and the American National Bank & Trust Company became a successor trustee. Later the American National Bank and Fawell resigned as trustees, and the Trust Company of New York, representing Carroll, Rosenbort and Friedstein (hereinafter called defendants), was appointed successor trustee.

Boenloke, Inc., continued to sell apartments in the building after October 1, 1928, advancing various sums for advertising and other expenses until February 15, 1929. The master held that the agreement of January 13, 1928, employing Boenloke, Inc., as exclusive selling agents of the stock and apartments

in the building, was binding upon the defendants, who had knowledge at all times from October 1, 1928, that Boenicke, Inc., was engaged actively in the sale of leases; that the contract of January 10 was in no way disaffirmed on December 15, 1928 by the trustees for the benefit of creditors, and that defendants became liable to compensate their selling agent for its services between October 1, 1928 and February 15, 1929, in accordance with the terms of the contract of January 10, 1928. The chancellor found that while defendants were liable for sales made and moneys advanced after December 15, they were not liable for sales made and moneys advanced between October 1 and December 15, because in his opinion the agreement bearing date of December 15 was by its terms a bar to any claims prior to that date.

There is some conflict in the testimony as to what was said and done at the meeting of October 1, 1928. Mr. Altheimer, the attorney for defendants, stated that Boenicke, Inc., had through its agency handled the building from its inception, and he recommended that it be retained to continue the sale of the apartments, and Carroll testified it was agreed by the others that this agency was most competent and should continue the job of selling the apartments and finishing what had been started. Carroll further testified that terms were discussed and it was agreed that this agency would handle the sale of apartments on the same terms as before; that the terms of the contract of January 10, 1928, were discussed and subsequently this contract was handed to Mr. Blumberg, attorney for one of the creditors, who was drawing the trust agreement. The testimony of the attorneys for the creditors, who were witnesses produced on behalf of defendants was somewhat in conflict with that given by Mr. Carroll. Maurice Berkson, one of these attorneys testifying, did not recall that management was discussed, although Mr. Altheimer, the at-

in the building, was dining with the defendant, who had known-
 ledge at all times from October 1, 1928, that defendant, Inc., was
 engaged actively in the sale of houses; that the defendant of
 January 10 was in no way dissatisfied on December 18, 1928, by the
 trustees for the benefit of creditors, and that defendant was
 liable to compensate their selling agent for its services between
 October 1, 1928 and February 18, 1929, in accordance with the
 terms of the contract of January 10, 1928. The defendant found
 that while defendants were liable for sales made and money ad-
 vanced after December 18, they were not liable for sales made
 and money advanced between October 1 and December 18, because
 in his opinion the agreement bearing date of December 18 was by
 its terms a bar to any claim prior to that date.
 There is some conflict in the testimony as to what was
 said and done at the meeting of October 1, 1928. Mr. Althaus,
 the attorney for defendants, stated that Bookbinder, Inc., had
 through its agency handled the building from its inception, and
 he recommended that it be retained to continue the sale of the
 apartments, and Garroll testified it was agreed by the others
 that this agency was most competent and should continue the job
 of selling the apartments and building until had been completed,
 Garroll further testified that terms were discussed and it was
 agreed that this agency would handle the sale of apartments on
 the same terms as before; that the terms of the contract of Jan-
 uary 10, 1928, were discussed and subsequently this contract was
 handed to Mr. Althaus, Attorney for one of the creditors, who
 was drawing the trust agreement. The testimony of the witnesses
 for the creditors, who were witnesses produced on behalf of de-
 fendants was somewhat in conflict with that given by Mr. Garroll.
 Maurice Backus, one of these witnesses and a friend, did not recall
 that management was discussed, although Mr. Althaus, the at-

torney for Boenicke, Inc., had said this agency would keep the matter going.

The master saw and heard the witnesses and was in the best position to judge of the weight of their testimony. There are many cases holding that the findings of a master are entitled to consideration, and in Meyer v. Levy, 249 Ill. App. 408, it is said that "a court of review should be slow in disturbing the conclusions of the master upon the facts, unless it can be said that the master's conclusions were clearly contrary to the probative force of the evidence." The master found that Boenicke, Inc. continued to sell apartments under the contract of January 10, 1928 during the period between October 1, 1928 and February 15, 1929; that the defendants knew this and did not disaffirm the contract of January 10, which was by its terms made binding on the assignees.

The brief for Boenicke, Inc. persuasively argues that if it is successful it will only mean that it is paid for services actually rendered and moneys advanced, while if defendants are successful it will mean they will have obtained services and benefits without paying for the same.

The agreement of December 15, 1928 is not a bar to Boenicke, Inc. recovery of moneys earned between October 1 and that date. In the pleadings filed by defendants there is no claim that this document of December 15 is a bar. The first time this appears is in the objection to the master's report.

It should be borne in mind that at the meeting of October 1 the terms of the proposed trust were agreed upon and that Mr. Blumberg was appointed to draw up the trust agreement. This took several weeks, and it is in evidence that some of the parties did not sign it until some time after the date which it bore. Under such circumstances the actual dating of the document cannot be considered important as fixing the amounts due. The claims of

torney for Boonick, Inc., had told agency that I knew the

matter going.

The master saw and heard the witnesses and was in the

best position to judge of the weight of their testimony. There

are many cases holding that the findings of a master are entitled

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is said that "a court of review should be slow in disturbing the

conclusions of the master upon the facts, unless it can be said

that the master's conclusions were clearly contrary to the pre-

dictive force of the evidence." The master found that Boonick,

Inc., continued to fill apartments under the contract of January

10, 1928 during the period between October 1, 1928 and February

15, 1929; that the defendants knew this and did not disavow

the contract of January 10, which was by its terms made binding

on the assignees.

The brief for Boonick, Inc., purportedly argues that

if it is successful it will only mean that it is paid for ser-

vices actually rendered and money advanced, while its defendant

are successful it will mean they will have obtained services and

benefits without paying for the same.

The agreement of December 15, 1928 is not a bar to

Boonick, Inc., recovery of moneys earned between October 1 and

that date. In the pleadings filed by defendants there is no

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time this appears is in the objection to the master's report.

It should be borne in mind that at the meeting of October

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Finch was appointed to draw up the trust agreement. This

took several weeks, and it is in evidence that some of the parties

did not sign it until some time after the date when it bore.

Under such circumstances the actual date of the document cannot

be considered important as fixing the date of the agreement.

all the contractors were already fixed on October 1, 1928, and the amount of debentures they were to receive was already fixed on that date.

Examination of the trust agreement of December 15, 1928 does not support defendants' claim that by its terms it bars any claims of Boenicke, Inc. beyond October 1, 1928. The agreement contains the provision that Carroll, Schendorf and Fridstein warrant and represent that they have full, true and lawful right to make the assignment above set forth; that the claims set forth in Exhibits A, B, C and D, "are the only liens, claims, demands and obligations arising out of the purchase of said land and the construction of said building, unpaid at the date hereof." This is not a representation by Boenicke, Inc. but by the partnership of Carroll, Schendorf and Fridstein. Moreover, it represents that the partnership had only claims, etc., "arising out of the purchase of said land and the construction of said building." Boenicke, Inc., made no claims of obligations arising out of the purchase of the land and construction of the building, but claim payment for services in procuring tenants for the building. We find nothing in this agreement contrary to the claim of Boenicke, Inc. that it was entitled to compensation from October 1 to December 15, 1928. Other considerations support our conclusion that the trial court was in error in sustaining objections to the master's report in this respect.

February 15, 1929, Boenicke, Inc., entered into an agreement with the trustees named in the instrument of December 15, 1928, whereby the former was employed as exclusive agent to conduct the sale of leases, receiving a commission in accordance with the Chicago Real Estate Board rates, and compensation for the sale of stock and proprietary apartment leases in accordance

All the contractors were already filed on October 1, 1932, and the amount of \$20,000 was to be paid to the contractors on that date.

Examination of the trust agreement of December 15, 1932, does not support defendant's claim that by its terms it gave any claim of Boenick, Inc. beyond October 1, 1932. The agreement contains the provision that Carroll, Schenck and Weinstein warrant and represent that they have full, true and lawful right to make the assignment above set forth; that the claim set forth in Exhibits A, B, C and D, "are the only liens, claims, demands and obligations arising out of the purchase of said land and the construction of said building, unpaid at the date hereof." This is not a representation by Boenick, Inc. but by the partnership of Carroll, Schenck and Weinstein. Moreover, it represents that the partnership had only claims, etc., "arising out of the purchase of said land and the construction of said building." Boenick, Inc., made no claim of obligations arising out of the purchase of the land and construction of the building, but claim payment for services in procuring tenants for the building. We find nothing in this agreement contrary to the claim of Boenick, Inc. that it was entitled to compensation from October 1 to December 15, 1932. Other considerations in part our conclusion that the trial court was in error in sustaining objections to the master's report in this respect.

February 15, 1933, Boenick, Inc., entered into an agreement with the trustees named in the instrument of December 15, 1932, whereby the former was employed as exclusive agent to conduct the sale of leases, receiving a commission in accordance with the Chicago Real Estate Board rules, and compensation for the sale of stock and proxy for the sale of stock in accordance

with schedule "A" attached to the agreement. This agreement also provided that the agency was to pay all expenses in connection with the sale of the stock and to pay for advertising at the rate of not less than \$500 a month; also to receive as additional commission a sum equal to 1 per cent of the selling price of each unit. Boenicke, Inc. proceeded to sell various units of stock and proprietary leases and advanced various sums for advertising purposes, and continued these services during the latter part of 1928, and also the years 1929 and 1930. The master found that for such services it became entitled to receive commissions, less credits, of a balance of \$7,446; that it executed sub-leases and became entitled to receive commissions, and found that it was entitled to these amounts with interest at the rate of 5 per cent per annum from June 1, 1930. Boenicke, Inc. was entitled to compensation for services on apartments sold between December 15, 1928 and February 13, 1929, under the provisions of the contract of January 10, 1928.

The master found, and the trial court approved, that Boenicke, Inc. could not recover for moneys advanced on assumed leases, because of a provision in the contract of January 10, 1928 that all expenses incidental to sale were to be assumed by it. We agree with the conclusion that such moneys advanced were part of the expenses incidental to the sale of the premises and under this contract were assumed by it.

The master and court found that Boenicke, Inc. was not entitled to credit for \$1,426.10 for "miscellaneous expenses," because of insufficient proof and also the contract of January 10, 1928, providing that such expenses shall be borne by the selling agent. We also concur in this conclusion.

The decree found that after December 15, 1928, and prior to February 15, 1929, Boenicke, Inc. sold certain apartments in

with schedule "A" attached to the agreement. This agreement also provided that the agency was to pay all expenses in connection with the sale of the stock and to pay for advertising at the rate of not less than \$500 a month; also to receive an additional commission a sum equal to 1 per cent of the selling price of each unit. Bohnick, Inc. promised to sell various units of stock and proprietary leases and advanced various sums for advertising purposes, and continued these services during the latter part of 1928, and also the years 1929 and 1930. The master found that for such services it became entitled to receive commissions, less credits, of a balance of \$7,448; that it expended and loaned and became entitled to receive compensation, and found that it was entitled to these amounts with interest at the rate of 6 per cent per annum from June 1, 1930. Bohnick, Inc. was entitled to compensation for services on agreements with Bohnick, Inc. for the years 1928 and February 13, 1929, under the provisions of the contract of January 10, 1928.

The master found, and the trial court approved, that Bohnick, Inc. could not recover for money advanced on account of a provision in the contract of January 10, 1928 that all expenses incidental to sale were to be assumed by it. We agree with the conclusion that such money advanced was part of the expenses incidental to the sale of the premises and under this contract were assumed by it.

The master and court found that Bohnick, Inc. was not entitled to credit for \$1,448.10 for "miscellaneous expenses," because of insufficient proof and also the contract of January 10, 1928, providing that such expenses shall be borne by the selling agent. We also concur in this conclusion.

The master found that after December 13, 1928, and prior to February 13, 1929, Bohnick, Inc. sold certain apartments in

the East End avenue building and expended moneys for advertising; that on February 13 it had in its possession \$16,864.09 belonging to the trustees. The decree credited it with commissions and advertising expenditures aggregating \$9,843.72, leaving a balance due from it of money belonging to the trustees of \$7,020.37. Boenicke, Inc. argues that defendant successor trustee was not entitled to this credit, as the claim is barred by the statute of limitations. Defendants are not seeking any recovery against plaintiff in this respect. They are simply asserting that they are entitled to a credit to plaintiff's claim, and the trial court correctly found that the selling agent was overpaid in the amount of \$7,020.37.

The master allowed interest to plaintiff, but the court overruled the master in this respect. We are of the opinion that under section 2 of the Interest statute plaintiff is entitled to interest on all commissions on sales made after October 1, 1928, and on lease renewals and on moneys paid for advertising from the date such commissions became due, at 5 per cent per annum, to the date of the decree to be entered herein under the remanding order.

We think the chancellor properly taxed the costs between the parties.

The briefs of both parties exhibit a high degree of forensic ability and skill. But in the intensity of mutual combat, the principal purpose of a brief - to enlighten the court - has been somewhat forgotten.

The decree is affirmed in part and reversed in part, and the cause is remanded with directions to state the account consistent with what we have held in this opinion.

AFFIRMED IN PART, REVERSED IN PART AND
REMANDED WITH DIRECTIONS

Matchett, and O'Connor, JJ., concur.

the East and Avenue building and extended across the street; that on February 13 it had in its possession 12,541.00 belonging to the trustee. The decree credited it with possession and advertising expenditures aggregating 10,841.77, leaving a balance due from it of money belonging to the trustee of 1,699.23. Bechtel, Inc., argues that defendant's account should not be entitled to this credit, as the claim is barred by the statute of limitations. Defendants are not seeking any recovery against plaintiff in this respect. They are simply asking that they are entitled to a credit to plaintiff's claim, and the trial court correctly found that the selling amount was overpaid in the amount of 1,699.23.

The master allowed interest to plaintiff, but the court overruled the master in this respect. As one of two opinions that under section 2 of the Interest statute plaintiff is entitled to interest on all conditions on which said debt was due, 1935, and on lease renewals and on moneys paid for advertising from the date such conditions became due, at 3 per cent per annum, to the date of the decree to be entered here in under the foregoing order, we think the chancellor properly fixed the date between the parties.

The briefs of both parties exhibit a high degree of forensic ability and skill. But in the intensity of mutual combat, the principal purpose of a trial - an enlightenment of the court - has been somewhat forgotten.

The decree is affirmed in part and reversed in part, and the cause is remanded with directions to state the amount consistent with what we have held in this opinion.

RECORDED IN PART, REVERSED IN PART AND
RECORDED WITH DIRECTIONS

41717)
41718) Consolidated cases.

ROSE F. GILBERT,
Appellee,

v.

JOSEPH ROSENBERG and
HARRY ZISOOK,
Appellants.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

313 I.A. 353

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Plaintiff brought two suits in the Municipal court against defendants as guarantors of the payment of principal and interest of \$3,500 face value of mortgage bonds owned and held by her. (Municipal court cases Nos. 2780871 and 2780872.) The causes were consolidated for trial and heard by the court without a jury on Pleadings and Admission of Facts under par. 259.18, subpar. (2) of the Civil Practice Act (ch. 110, Ill. Rev. Stat. 1941). The court denied effect to a plea of res judicata arising from an order or decree of the United States District Court in reorganization proceedings under sec. 77-B of the Bankruptcy Act, and entered judgments against defendants aggregating \$6,000, from which they have taken an appeal.

From the pleadings and uncontroverted facts it appears that plaintiff was the owner and holder of matured mortgage bonds executed by Joseph R. Loewenstein, in the aggregate principal amount of \$3,500, of which \$1,500 of face value, dated December 1, 1927, were a portion of an issue of \$325,000, secured by a mortgage trust deed conveying real property in Chicago, known as 5711-17 Kenwood Avenue Apartments, and \$2,000 of face value, dated February 19, 1926, were a portion of an issue of \$265,000, secured by a mortgage trust deed conveying

41713 } Consolidated cases.
41714 }

ROSE F. GILBERT,
Appellee,
v.
JOSEPH ROBINSON and
HARRY KROOK,
Appellants.

APPEAL FROM MUNICIPAL

COURT OF CHICAGO.

31814.858

MR. JUSTICE FRANK D. LIVINGSTON, JR. OF THE COURT.

Plaintiff brought two suits in the Municipal Court against defendants as guarantors of the payment of principal and interest of \$3,700 face value of mortgage bonds owned and held by her. (Municipal Court cases Nos. 1708871 and 1708872.) The cases were consolidated for trial and heard by the court without a jury on pleadings and admission of facts under par. 279.18, subpar. (2) of the Civil Practice Act (Ch. 110, Ill. Rev. Stat. 1941). The court denied effect to a plea of res judicata arising from an order or decree of the United States District Court in reorganization proceedings under sec. 77-3 of the Bankruptcy Act, and entered judgment against defendants aggregating \$6,000, from which they have taken an appeal.

From the pleadings and uncontested facts it appears that plaintiff was the owner and holder of certain mortgage bonds executed by Joseph F. Robinson, in the aggregate principal amount of \$3,700, of which \$1,700 of face value, dated December 1, 1927, were a portion of an issue of \$325,000 secured by a mortgage trust deed conveying real property in Chicago, known as 5711-17 Kenwood Avenue Apartments, and \$2,000 of face value, dated February 17, 1926, were a portion of an issue of \$467,000, secured by a mortgage trust deed conveying

real estate in Chicago, known as the North-Mason Building. Defendants by written instruments, executed at the time of issuance of the bonds, guaranteed their payment, with interest.

October 17, 1934, Ruskin Hall Building Corporation was the owner of both of these properties, as well as other real estate in Chicago known as the Blackstone Court and Mansfield Block. On that date it filed its petition for reorganization under sec. 77-B of the Bankruptcy Act in the District Court of the United States, and November 16, 1934, the petition was duly approved by the court as having been properly filed.

January 14, 1935, plaintiff obtained leave of the District Court to enter her appearance and to intervene in the reorganization proceedings. Shortly thereafter she moved the District Court for appointment of a temporary trustee for the debtor's assets, for an accounting, and for other relief. February 18, 1935, she filed her proofs of debt in the reorganization proceeding, based upon the \$3,500 of mortgage bonds owned and held by her, which were accompanied by her written and signed instrument stating that "I do not consent to plan of reorganization set forth by debtor."

January 14, 1935, the debtor, Ruskin Hall Building Corporation, filed separate plans of reorganization for the Ruskin Hall Building and the North-Mason Building, each of which provided for the organization of a separate corporation to which the two buildings were respectively to be conveyed, the issuance of stock of the new corporations to the bondholders, and the release of all claims against the makers and guarantors of the mortgage bonds. Similar plans of reorganization were filed with respect to the other properties of the debtor. Twenty bondholders filed written objections to the plan for the Ruskin Hall Building,

real estate in Chicago, known as the North-Nashon Building, defendants by written instruments, executed at the time of issuance of the bonds, guaranteed their payment, with interest. October 17, 1934, Washin Hall Building Corporation was the owner of both of these properties, as well as other real estate in Chicago known as the Alcatraz Court and Washin Hall. On that date it filed its petition for reorganization under sec. 77-B of the Bankruptcy Act in the District Court of the United States, and November 10, 1934, the petition was duly approved by the court as having been properly filed.

January 14, 1935, Plaintiff obtained leave of the District Court to enter her appearance and to intervene in the reorganization proceedings. Shortly thereafter she moved the District Court for appointment of a temporary trustee for the debtor's assets, for an accounting, and for other relief. February 18, 1935, she filed her proofs of debt in the reorganization proceedings, based upon the \$3,500 of mortgage bonds owned and held by her, which were accompanied by her written and signed instrument stating that "I do not consent to plan of reorganization set forth by debtor."

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and thirteen bondholders to the North Mason Building plan. Numerous other bondholders filed objections to the plans respecting the other properties. Among the objectors, eight opposed on general grounds the release of the guarantors, while four, among them one holder of bonds on the Ruskin Hall Building and two holders of bonds on the North Mason Building, specifically contested the jurisdiction of the United States District Court, in proceedings for corporate reorganization, to confirm plans providing for the release of the guarantors.

March 12, 1935, the plans of reorganization, together with the consents and objections thereto and proposed modifications thereof, were referred for hearing to Charles A. McDonald, a master in chancery of the District Court, with directions to take proofs, make findings of fact and conclusions of law thereon, and report same to the District Court. The master held hearings on six separate days in March and April, 1935. Plaintiff, Rose F. Gilbert, attended three of these hearings, at which she cross-examined witnesses and otherwise participated in the proceedings.

At the hearing April 3, 1935, in the presence of plaintiff, David H. Kraft, representing a bondholder of the Ruskin Hall Building, argued against the jurisdiction of the court to release the guarantors. Plaintiff did not appear at the three subsequent hearings at which Kraft continued with his argument and at which Benjamin H. Washer, representing a bondholder of the Blackstone Court Apartments, likewise argued against the power of the court to release the guarantors from their obligations. Washer also filed extensive written suggestions opposing the plan on various grounds, including the contention that the court lacked jurisdiction. At one of the hearings in April, Joseph W. Cox, representing a bondholder of the Ruskin Hall Building, obtained leave of the master to adopt Washer's

and thirteen bondholders to the North Mason Building, and numerous other bondholders filed objections to the plan respecting the other properties. Among the objections, eight opposed on general grounds the release of the guarantors, while four, among them one holder of bonds on the North Mason Building and two holders of bonds on the North Mason Building, specifically contested the jurisdiction of the United States District Court in proceedings for corporate reorganization, to continue plans providing for the release of the guarantors.

March 12, 1935, the plan of reorganization, together with the consents and objections thereto and proposed modifications thereof, were referred for hearing to Charles A. Bonham, a master in chancery of the District Court, with directions to take proofs, make findings of fact and conclusions of law thereon, and report same to the District Court. The master held hearings on six separate days in March and April, 1935. Plaintiff, Mrs. E. Gilbert, attended three of these hearings, at which she cross-examined witnesses and otherwise participated in the proceedings. At the hearing April 3, 1935, in the presence of Plaintiff, David M. Kraft, representing a bondholder of the Blackstone Hall Building, argued against the jurisdiction of the court to release the guarantors. Plaintiff did not appear at the three subsequent hearings at which Kraft continued with his argument and at which Benjamin A. Berman, representing a bondholder of the Blackstone Court Apartments, likewise argued against the power of the court to release the guarantors from their obligations. Plaintiff also filed extensive written suggestions opposing the plan on various grounds, including the contention that the court lacked jurisdiction. At one of the hearings in April, Joseph W. Cox, representing a bondholder of the Blackstone Hall Building, obtained leave of the court to appoint

argument and suggestions, and to apply them to the Ruskin Hall Building plan. Plaintiff was present at the last hearing on April 22, 1935, at which the master said that the questions before him were whether the plan of reorganization was fair and equitable and for the best interests of all the bondholders, and whether defendants should be released from their guaranty. He specifically inquired of the bondholders present whether any of them wished to ask any further questions, and plaintiff participated in the ensuing discussion. Washer then said that he represented a dissenting bondholder who was vigorously opposing the plan, "But I do want to state, for the benefit of all the bondholders, that I believe that we have got enough evidence in the record now to make all our objections; that the Master has permitted every proper question to be answered. *** I believe that we have a complete record here."

The master filed his report June 6, 1935, recommending that all objections filed to the respective plans of reorganization be overruled, except objections relating to the number of directors of the new corporations, the manner of choosing these directors, and the subordination of the debtor's interest in the new corporations; and that the plans of reorganization be approved by the court in their entirety, with the exception of amendments pertaining to those features alone.

June 21, 1935, after due notice to all parties, including plaintiff's attorneys of record, the court entered its decree approving the report of the master, confirming and approving the plans of reorganization, decreeing the bonds and coupons "to be cancelled and of no further legal effect whatsoever, all obligation thereon being from this date extinguished and discharged, and that said bonds and coupons shall only remain in effect as a medium of exchange for the new securities as provided in said respective plans of reorganization as modified," and ordering the release

argument and suggestions, and to reply to the questions of the Building Plan. Plaintiff was present at the last meeting on April 22, 1935, at which the matter was discussed. Plaintiff was before him to discuss the plan of reorganization and to ask him to advise him for the best interests of all the bondholders, and whether defendant should be released from their liability. Plaintiff specifically inquired of the defendant present whether any of them wished to ask any further questions, and Plaintiff participated in the ensuing discussion. Defendant then said that he represented a dissenting bondholder who was vigorously opposing the plan. But I do want to state, for the benefit of all the bondholders, that I believe that we have for some time been in the record now to make all our objections; that the matter has permitted every proper question to be answered. I believe that we have a complete record here."

The master filed his report June 1, 1935, recommending that all objections filed to the proposed plan of reorganization be overruled, except objections relating to the manner of disposing of the new corporations, the manner of disposing of the assets, and the subordination of the debtor's interest in the new corporations; and that the plan of reorganization be approved by the court in their entirety, with the exception of amendments pertaining to those features alone.

June 21, 1935, after the notice to all parties, including plaintiff's attorneys of record, the court entered its decree approving the report of the master, confirming and approving the plan of reorganization, directing the hands and names to be cancelled and of no further legal effect whatsoever, all obligations thereon being from this date extinguished and discharged, and that said bonds and coupons shall only remain in effect as a medium of exchange for the new securities as provided in said respective plans of reorganization as modified, and ordering the plan

of the trust deeds securing the bonds.

Subsequently, November 18, 1935, the District Court entered a decree finding that all things required to be done by the debtor in the consummation of its plans of reorganization had been carried out or provided for, and closing the reorganization proceedings.

The holders of over 95 per cent of the bonds on each of the two properties here in question have exchanged them for new securities provided for them under the plans of reorganization. Plaintiff, however, did not accept the plans of reorganization nor the securities available to her thereunder, but instituted the two suits in the Municipal court against the guarantors to recover the face value of the principal of her bonds and interest thereon. No order or decree in the reorganization proceedings has ever been appealed from or in any manner stayed, reversed or modified.

The defense interposed that the decree of the United States District Court is res judicata and constitutes a bar to the consolidated causes, is predicated largely on defendant's participation in the reorganization proceedings, where she intervened, pursuant to leave, entered her appearance, filed claims, moved for appointment of a trustee and other relief, dissented from the plans of reorganization, participated in hearings and examined witnesses, while other creditors of the same class pleaded and urged objections, with full opportunity to her to join therein, to the effect that the court lacked jurisdiction to confirm plans of corporate reorganization having the effect of discharging the obligations of the individual guarantors.

We have heretofore had occasion to pass upon and deny the right of dissenting creditors to pursue in state courts, against the original makers and guarantors of mortgage bonds

of the trust deeds securing the bonds.

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The holders of over 95 per cent of the bonds on each of the two properties now in question have exchanged them for new securities provided for them under the plans of reorganization. Plaintiff, however, did not accept the plans of reorganization nor the securities available to her thereunder, but instituted the two suits in the Municipal Court against the guarantors to recover the face value of the principal of her bonds and interest thereon. No order or decree in the reorganization proceedings has ever been appealed from or in any manner stayed, reversed or modified.

The defense interposed that the decree of the United States District Court is res judicata and constitutes a bar to the consolidated causes, as provided largely on defendant's participation in the reorganization proceedings, where she intervened, pursuant to leave, entered her appearance, filed claims, moved for appointment of a trustee and other relief, dissented from the plans of reorganization, participated in hearings and examined witnesses, while other creditors of the same class pleaded and urged objections, with full opportunity to her to join therein, to the effect that the court lacked jurisdiction to confirm plans of corporate reorganization having the effect of discharging the obligations of the individual guarantors.

It is here contended that the right of dissenting creditors to present their claims against the original holders and guarantors of mortgage bonds

secured by the corporate debtor's property, remedies inconsistent with prior decrees of reorganization entered by the District Court under sec. 77-B of the Bankruptcy Act. In Barnett v. Gitlitz, 290 Ill. App. 212, a decree of reorganization had been entered in the United States District Court which provided for the satisfaction in full of a foreclosure decree, the release of the trust deed which had been the subject matter of foreclosure and the cancellation and exchange of the bonds secured by the trust deed for stock of the debtor corporation. Thereafter plaintiff had judgment on two of the bonds in the Municipal court against five individual makers. On appeal the cause was remanded with directions to cause a satisfaction of the judgment to be entered in the Municipal court on the ground that "full force and effect" should be given to the laws of the United States and the orders and decree of the United States District Court. Subsequently in Osborn v. Thorn, 298 Ill. App. 261, a decree for reorganization of property under sec. 77-B of the Bankruptcy Act had provided that the bonds secured by the first mortgage trust deed be cancelled and of no effect, except as a medium of exchange. Following this decree, plaintiff had judgment in the Superior court against two principal makers of mortgage bonds. It was held on appeal that the District Court having jurisdiction of the subject matter, "if an interested party is not satisfied with the decision of the United States District Court, his privilege is to appeal therefrom if he so desires and not attempt to present the question for decision in a court other than a court of review."

Preceding these two decisions an opinion was filed (April 5, 1937) in Gottlieb v. Crowe and Stoll, 289 Ill. App. 595, the circumstances of which were strikingly similar to the case at bar. In that proceeding Gottlieb brought suit in the Municipal court and had judgment against defendants as guarantors of

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Preceding these two decisions an opinion was filed (April
5, 1937) in Gottlieb v. Grove and Stoll, 299 Ill. App. 205, the
circumstances of which were strikingly similar to the case at
bar. In that proceeding Gottlieb brought suit in the municipal
court and had judgment against defendants as guarantors of

principal and interest of \$1,500 face value of mortgage bonds owned by him. The United States District Court had previously entered a decree for reorganization of the mortgaged property under sec. 77-B of the Bankruptcy Act, on which Gottlieb's bonds were issued. That decree provided for the cancellation and surrender of the personal guaranties of Stoll and Crowe. Creditors of the same class as Gottlieb had filed written objections to the cancellation of the guaranty and moved that the confirmation of the plan, as approved by the District Court, be vacated. The objections were referred to a master, who recommended that they be overruled, and the court followed the master's recommendation. Gottlieb did not appear in the reorganization proceedings, but during the pendency of the suit in the Municipal court he filed his verified petition in the District court, setting forth ownership of his bonds, stating that he had not approved or accepted the plan of reorganization theretofore confirmed by the court, averring that the District Court did not have the power to cancel the written guaranty and asking that the court vacate or modify the decree to that extent. The debtor's verified answer to Gottlieb's petition apprised the court of the various steps taken in the reorganization proceeding and of plaintiff's receipt of notices of the hearings in the District Court. Upon consideration of the petition and answer, the court again refused to modify the decree approving the plan of reorganization. In the Municipal court Gottlieb contended that the District Court was without authority to cancel the guaranty and, therefore, the decree of that court was not res judicata. When the case was being tried in the Municipal court, the power or authority of the District Court to cancel individual guaranties on bonds in reorganization proceedings had not been determined by any appellate tribunal, but during the interim between the disposition of the case in the Municipal court and the filing

principal and interest of \$1,500 face value of mortgage bonds owned by him. The United States District Court had previously entered a decree for reorganization of the mortgaged property under sec. 77- of the Bankruptcy Act, on which Gottlieb's bonds were issued. That decree provided for the cancellation and surrender of the personal guarantees of Wolf and Grove. Creditors of the same class as Gottlieb had filed written objections to the cancellation of the guaranty and moved that the confirmation of the plan, as approved by the District Court, be vacated. The objections were referred to a master, who recommended that they be overruled, and the court followed the master's recommendation. Gottlieb did not appear in the reorganization proceedings, but during the pendency of the suit in the Municipal court he filed his verified petition in the District court, setting forth ownership of his bonds, stating that he had not approved or accepted the plan of reorganization then before confirmed by the court, averring that the District Court did not have the power to cancel the written guaranty and asking that the court vacate or modify the decree to that extent. The debtor's verified answer to Gottlieb's petition appeared the court of the various steps taken in the reorganization proceeding and of plaintiff's receipt of notices of the hearings in the District Court. Upon consideration of the petition and answer the court again refused to modify the decree approving the plan of reorganization. In the Municipal court Gottlieb contended that the District Court was without authority to cancel the guaranty and, therefore, the decree of that court was not final. When the case was being tried in the Municipal court, the power or authority of the District Court to cancel individual guarantees on bonds in reorganization proceedings had not been determined by any appellate tribunal, but during the interval between the disposition of the case in the Municipal court and the filing

of the opinion in Gottlieb v. Crowe and Stoll, the Circuit court of Appeals, Seventh Circuit, held that in corporate reorganization proceedings a guarantor of the debtor's bonds could not, as against holders of old bonds not consenting to the reorganization plan, be released from such guaranty in consideration of his guaranty of a new bond issue pursuant to a plan of reorganization under sec. 77-B of the Bankruptcy Act. (In re Diversey Building Corporation, 86 Fed. Rep. (2nd) 456, opinion filed November 6, 1936.) Petition for a writ of certiorari to review the decision of the Circuit court of Appeals was denied by the Supreme court of the United States (February 15, 1937) in Diversey Building Corporation v. Weber et al., 300 U. S. 662. In reaching its conclusion in Gottlieb v. Crowe and Stoll, the Appellate court was conversant with the ruling in the Diversey Building Corporation case. Nevertheless, it was held that since that very question had twice been squarely put in issue in the District Court and determined adversely to Gottlieb's contention, the decree of the Federal court was res judicata in the later proceeding in the Municipal court brought to enforce the payment of the guaranty on Gottlieb's bonds.

Thereafter Gottlieb had leave to appeal to the Supreme Court of Illinois, which reversed the Appellate Court and held (Gottlieb v. Crowe, 368 Ill. 88) that the District Court was without jurisdiction to cancel the individual guaranty in a reorganization proceeding and that the question could be raised in a collateral proceeding against the guarantors on the bonds because it affected the jurisdiction of the District Court as to the subject matter involved. The Supreme Court recognized the inherent power of courts to determine the existence or non-existence of jurisdictional facts as an essential attribute of the functioning of every court, but said that no court can

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(In re Diversey Building Corporation, 85 Fed. Res. (3rd) 430,
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consideration of his guaranty of a new bond issued pursuant to
the reorganization plan, be released from such guaranty in
could not, as against holders of old bonds not consenting to
reorganization proceedings a guaranty of the holder's bonds
court of Appeals, Seventh Circuit, held that in conformity
of the opinion in Gottlieb v. Crowe and Stoll, the District

expand its statutory or constitutional powers by a recital that it has jurisdiction of a subject matter which, in law, ^{it} does not have.

Thereafter the Supreme Court of the United States allowed certiorari to review the judgment of the Supreme Court of Illinois, which had denied effect to the plea of res judicata interposed by defendant, and in Stoll v. Gottlieb (opinion filed Nov 21, 1938), 305 U. S. 165, reversed the judgment of the Supreme Court of Illinois. Its inquiry was directed solely to the validity of the defense of res judicata, as made in the Municipal court proceeding. With respect to the conclusiveness of the order of the District Court releasing the guarantor from the obligation of his guaranty, it was said that although courts do not have the power, by judicial fiat, to extend their jurisdiction over matters beyond the scope of the authority granted them by their creditors, "There must be admitted, however, a power to interpret the language of the jurisdictional instrument and its application to an issue before the court. Where adversary parties appear, a court must have the power to determine whether or not it has jurisdiction of the person of a litigant, or whether its geographical jurisdiction covers the place of the occurrence under consideration. Every court in rendering a judgment, tacitly, if not expressly, determines its jurisdiction over the parties and the subject matter. An erroneous affirmative conclusion as to the jurisdiction does not in any proper sense enlarge the jurisdiction of the court until passed upon by the court of last resort, and even then the jurisdiction becomes enlarged only from the necessity of having a judicial determination of the jurisdiction over the subject matter. When an erroneous judgment, whether from the court of first instance or from the court of final resort, is pleaded in another court or another jurisdiction the question is whether the former judgment is res

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judgment, whether from the court of first instance or from the
court of final resort, is placed in another court or another
jurisdiction the question is whether the former judgment is res

judicata. After a federal court has decided the question of the jurisdiction over the parties as a contested issue, the court in which the plea of res judicata is made has not the power to inquire again into that jurisdictional fact." In reaching that conclusion the United States Supreme Court necessarily assumed that the District Court did not have jurisdiction of the subject matter of its order, namely, the release, in reorganization, of an individual guarantor, because the opinion of the Circuit Court of Appeals in In re Diversey Building Corporation had previously been filed and certiorari denied by the Supreme Court of the United States. The decision was based on the fact that in an actual controversy the question of the jurisdiction over the subject matter was raised and determined adversely to the defendant Stoll and that that determination was res judicata of the issue, whether or not power to deal with the particular subject matter was "strictly or quasi-jurisdictional." The facts in the Gottlieb case are closely analogous to those in the case at bar, the principal point of distinction being that in this proceeding plaintiff did not herself urge objections to the United States District Court's jurisdiction to cancel the guaranties, although she had full opportunity to join with other bondholders of the same class who did so; whereas Gottlieb, during the pendency of his suit against the guarantors in the Municipal court, had unsuccessfully petitioned the District Court to vacate or modify its decree of confirmation so as to eliminate the cancellation of the guaranty, upon the ground that it lacked the power to confirm such a plan in the first instance.

Plaintiff's counsel say that the question of the jurisdiction of the District Court to release the guarantors was not raised in an actual controversy before the District Court between the plaintiff and the defendants as to the defendants' liability as guarantors. They argue that the record of the reorganization pro-

indicate. After a Federal court has decided the question of the jurisdiction over the party as a contested issue, the court in which the plea of res judicata is made was not the power to inquire again into that jurisdictional fact. In reaching that conclusion the United States Supreme Court necessarily assumed that the District Court did not have jurisdiction of the subject matter of the order, namely, the release, in reorganization, of an individual guarantor, because the opinion of the Circuit Court of Appeals in In re Hively Building Corporation had previously been filed and certified denied by the Supreme Court of the United States. The decision was based on the fact that in an actual controversy the question of the jurisdiction over the subject matter was raised and determined adversely to the defendant. It is held that that determination was res judicata of the issue, whether or not power to deal with the guarantor and fact matter was "strictly or quasi-jurisdictional." The facts in the Gottlieb case are closely analogous to those in the case at bar, the principal point of distinction being that in this proceeding plaintiff did not herself urge objections to the United States District Court's jurisdiction to compel the guarantors, although she had full opportunity to join with other bondholders of the same class who did so; whereas defendant, during the pendency of his suit against the guarantors in the Municipal court, had unsuccessfully petitioned the District Court to vacate or modify its decree of confirmation so as to eliminate the cancellation of the guaranty, upon the ground that it lacked the power to confirm such a plan in the first instance.

Plaintiff's counsel say that the question of the jurisdiction of the District Court to release the guarantors was not raised in an actual controversy before the District Court between the plaintiff and the defendant as to the guarantors' liability as guarantors. They argue that the record of the reorganization pro-

ceedings introduced in evidence in this cause does not show that plaintiff as a bondholder had raised the question of jurisdiction or that she had participated with other creditors who had raised the issue, either before the master or the court, and that the record does not show that the District Court passed upon that question or made any finding with respect thereto as to Mrs. Gilbert. The Municipal court adopted plaintiff's position and expressed the opinion that the question of jurisdiction was not raised. It is true that plaintiff did not specifically challenge the court's jurisdiction to release the guarantors, but she had filed her dissent from the plan and remained silent while numerous other bondholders argued that the court lacked jurisdiction to cancel the guaranties. Moreover, the master said that one of the questions before him was whether the individual guarantors should be released, and his report recommended the overruling of all objections and the approval of the release of the guarantors. Thereafter, the court, after due notice to all parties including plaintiff, entered its order approving and confirming the master's report and decreeing the adoption of the plan of reorganization. It thus appears that the jurisdictional issue was pleaded in the form of numerous objections, stated as an issue by the master, argued as a proposition of law, and that objections of other bondholders, challenging the jurisdiction of the court, were overruled and the plans of reorganization confirmed. Plaintiff had full opportunity to join in the jurisdictional issue which was necessarily involved in the proceeding and was concluded by the judgment therein. The precise question was under consideration in Chicot County Drainage District v. Baxter State Bank, 308 U. S. 371, wherein, following Stoll v. Gottlieb, 305 U. S. 165, the Supreme Court of the United States was called upon to determine whether the rule of immunity from collateral

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plaintiff as a bondholder had raised the question of jurisdiction
or that she had participated with other creditors who had raised
the issue, either before the master or the court, and that the
record does not show that the District Court passed upon that ques-
tion or made any finding with respect thereto as to Mrs. Wilcox.
The Municipal court adopted plaintiff's position and expressed the
opinion that the question of jurisdiction was not raised. It is
true that plaintiff did not specifically challenge the court's
jurisdiction to release the guarantors, but she did raise the
dissent from the plan and remain silent while numerous other
bondholders urged that the court lacked jurisdiction to accept
the guaranties. Moreover, the master said that one of the questions
before him was whether the individual guarantors should be released,
and his report recommended the overruling of all objections and the
approval of the release of the guarantors. Thereafter, the court,
after due notice to all parties including plaintiff, entered an
order approving and confirming the master's report and decreeing
the adoption of the plan of reorganization. It thus appears that
the jurisdictional issue was pleaded in the Court of numerous objec-
tions, stated as an issue by the master, argued as a proposition of
law, and that objections of other bondholders, including the
jurisdiction of the court, were overruled and the plan of reorgani-
zation confirmed. Plaintiff had full opportunity to join in the
jurisdictional issue which was necessarily involved in the proceeding
and was concluded by the judgment therein. The justice question
was under consideration in United States v. Baker, 308 U. S. 371, wherein, following Steel v. Bell, 305 U. S. 152, the Supreme Court of the United States was called
upon to determine whether the rule of immunity from collateral

attack was applicable where the jurisdictional question, although inherent in the case, was neither recognized nor litigated by the parties. It there appeared that the Municipal Debt Readjustment Act, under which the plaintiff district had reorganized, was subsequently held unconstitutional in another case by the Supreme court. Thereafter bondholders of the district who had never submitted to the plan of reorganization brought suit to recover on their bonds. The district pleaded its decree of reorganization under which the bonds had been ordered cancelled. Bondholders demurred to the answer. The Supreme court sustained the decree of reorganization against collateral attack and reversed the trial court's judgment in favor of the bondholders, saying: "The court has the authority to pass upon its own jurisdiction and its decree sustaining jurisdiction against attack, while open to direct review, is res judicata in a collateral action. [Citing Stoll v. Gottlieb, 305 U. S. 165.] Whatever the contention as to jurisdiction may be, whether it is that the boundaries of a valid statute have been transgressed, or that the statute itself is invalid, the question of jurisdiction is still one for judicial determination. *** There can be no doubt that if the question of the constitutionality of the statute had actually been raised and decided by the District Court in the proceeding to effect a plan of debt readjustment in accordance with the statute, that determination would have been final save as it was open to direct review upon appeal. Stoll v. Gottlieb, supra." (Italics ours.) With respect to the question whether bondholders had raised the issue in the proceeding in which they were parties and in which they could have raised it and had it finally determined, the court held that they were not privileged to remain quiet and raise it in a subsequent suit, since "Such a view is contrary to the

well-settled principle that *res judicata* may be pleaded as a bar, not only as respects matters actually presented to sustain or defeat the right asserted in the earlier proceeding, 'but also as respects any other available matter which might have been presented to that end.'" The effect of that decision was to uphold against collateral attack a decree of reorganization entered by a court which lacked jurisdiction because of the unconstitutionality of the statute under which it had proceeded, and although the issue of the court's jurisdiction had **not** been raised by anyone, the fact that it could have been raised was considered sufficient to render the decree invulnerable. By the same process of reasoning, even though the District Court in the case at bar had not been called upon in an actual contest to pass upon its power under the Bankruptcy Act to release guarantors as part of a plan of corporate reorganization, the fact that it did so in a proceeding conducted under the statute, with full opportunity to bondholders and other parties to raise the point if they so desired, makes the decree of the District Court immune to attack in a collateral proceeding.

We consider the circumstances of the case at bar much stronger against the contention of plaintiff than those in either the Gottlieb or the Chicot County Drainage District cases because the record is replete with uncontradicted evidence that Mrs. Gilbert participated in the reorganization proceeding from beginning to end, having intervened by leave of court, filed her appearance, moved for appointment of a temporary trustee and other relief, objected to the plan of reorganization, filed her proof of claim, attended hearings and cross-examined witnesses. Even though she did not specifically contest the jurisdiction of the court or its right to release the original guarantors, she had full opportunity to do so, and the reorganization having been decreed, notwithstanding her dissent thereto, she had her choice to appeal or

well-settled principle that this state may be pleaded as a bar, not only as respects matters actually presented to the court, or at least the right asserted in the earlier proceedings, but also as respects any other available matter which might have been presented to that end. The effect of this decision was to uphold against collateral attack a decree of reorganization entered by a court which lacked jurisdiction because of the unconstitutionality of the statute under which it had proceeded, and although the issue of the court's jurisdiction had not been raised by anyone, the fact that it could have been raised was considered sufficient to render the decree invalid. By the same process of reasoning, even though the district court in the case at bar had not been called upon in an actual contest to pass upon its power under the bankruptcy act to release guarantors as part of a plan of corporate reorganization, the fact that it did so in a proceeding conducted under the statute, with full opportunity to bondholders and other parties to raise the point if they so desired, makes the decree of the district court known to attack in a collateral proceeding.

We consider the circumstances of the case at bar much stronger against the contention of plaintiff than those in either the Northrup or the Chicago County cases because the record is replete with uncontradicted evidence that Mrs. Gillett participated in the reorganization proceeding from beginning to end, having intervened by leave of court, filed her appearance, moved for appointment of a temporary trustee and other relief, objected to the plan of reorganization, filed her proof of claim, attended hearings and cross-examined witnesses. Even though she did not specifically contest the jurisdiction of the court on its right to release the original guarantors, she had full opportunity to do so, and the reorganization having been approved, notwithstanding her dissent thereto, she had no choice to appeal or

abide by the decree. The conclusions reached in the foregoing decisions, except Barnett v. Gitlitz, were predicated on the doctrine of res judicata, which is applicable to plaintiff's situation; moreover, we think that by reason of her participation in the District Court proceedings, wherein she could have questioned the jurisdiction of the court or adopted the objections and arguments of other bondholders who did so, she is estopped from relitigating the same question in these collateral actions. The judgments of the Municipal court are, therefore, reversed.

JUDGMENTS REVERSED.

Scanlan, P. J., and Sullivan, J., concur.

aside by the decree. The conclusions reached in the foregoing
decisions, except Wright v. Miller, were predicated on the
doctrine of res judicata, which is applicable to Wright's
situation; moreover, we think that by reason of her participation
in the District Court proceedings, wherein she could have ques-
tioned the jurisdiction of the court or adopted the objections
and arguments of other bondholders who did so, she is estopped
from relitigating the same question in these collateral actions.
The judgments of the Municipal court are, therefore, reversed.

JUDGMENTS REVERSED.

Seawall, P. J., and Sullivan, J., concur.

31
4-15-42
STATE OF ILLINOIS
APPELLATE COURT

FILED

MAR 2 1942

David J. Mallon
CLERK OF THE APPELLATE COURT
FOURTH DISTRICT OF ILLINOIS

Abstract

October Term, A. D. 1941

41017

Term No. 41033

Agenda No. 12 3

F. C. BRYANT, Administrator of
the Estate of MERLE BRYANT,
deceased,

Plaintiff-Appellee,

v.

DONALD TAYLOR and WILLIAM C.
TAYLOR, co-partners and
doing business as WILLIAM
TAYLOR DRILLING COMPANY,

Defendants-Appellants

Appeal from the

Circuit Court of

Marion County.

667
313 I.A. 650 107

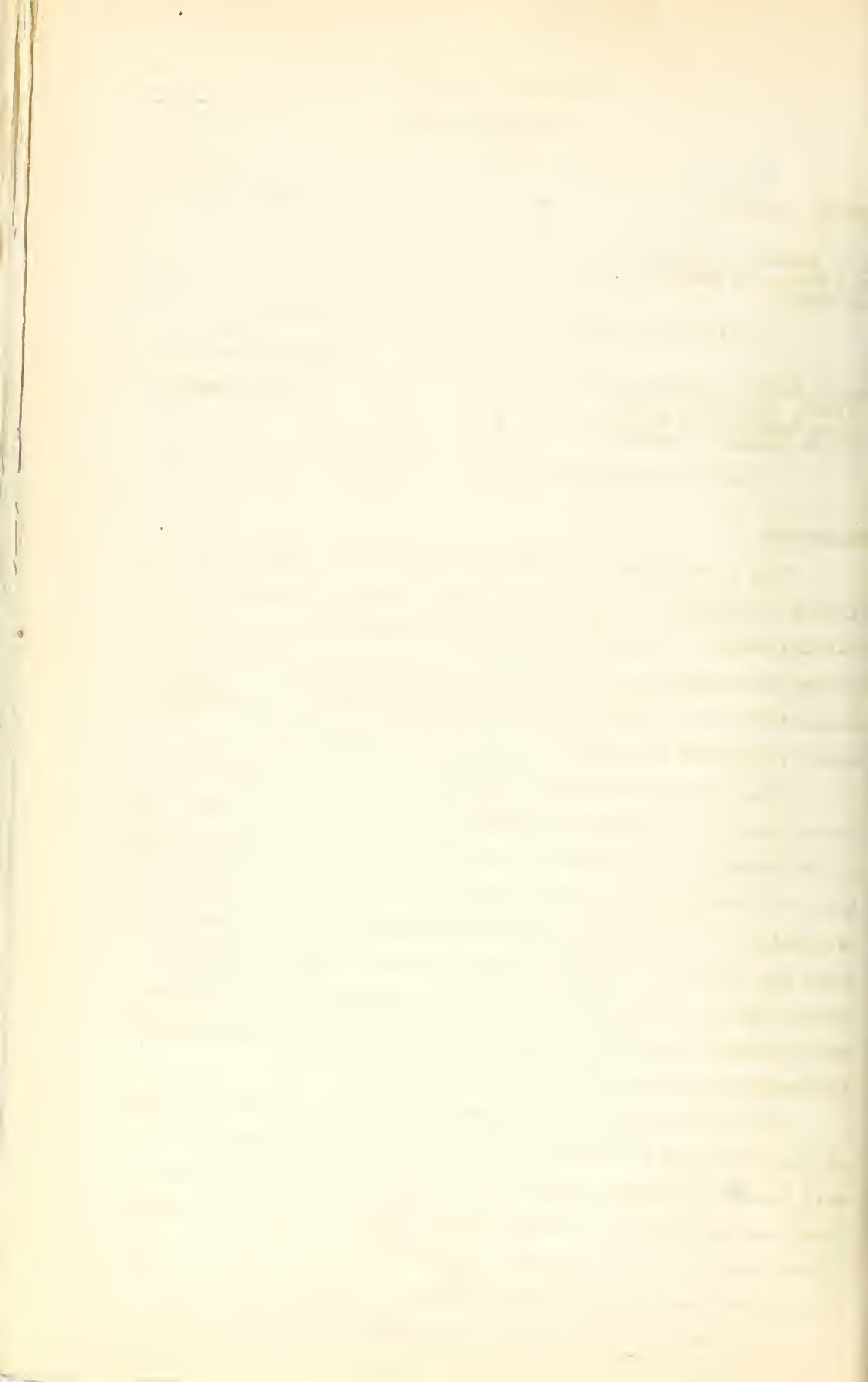
CULBERTSON, J.

This is an appeal by Defendants-Appellants, DONALD TAYLOR and WILLIAM C. TAYLOR, co-partners and doing business as WILLIAM TAYLOR DRILLING COMPANY (hereinafter called Defendants), from a judgment in the sum of \$5,000.00 in favor of Plaintiff-Appellee, F. C. BRYANT, Administrator of the Estate of MERLE BRYANT, deceased (hereinafter called Plaintiff) for the death of the said Merle Bryant.

The case was tried upon the issues made by the Third and Fourth Counts of an Amended Complaint, and the Answers thereto. The Fourth Paragraph of the Third Count of the Amended Complaint charges that the defendants, by their servant, carelessly, negligently, wrongfully, and improperly drove their automobile truck upon U. S. route 50, three miles west of Salem, in Marion County, Illinois, without giving the right of way to the deceased, who was then and there driving an automobile upon U. S. route 50 and approaching the intersection from the east, or to the right.

The Fourth Count of the Amended Complaint charges the failure of the defendants to display a red light from the rear end of the said automobile truck, visible for a distance of 500 feet. Each of these counts alleged the deceased Merle Bryant was in the exercise of due care for his own safety. The Answer of the defendants denies the allegations in Counts Three and Four of the Complaint.

The evidence discloses that Merle Bryant died on the 20th day



of June, 1939, as the result of injuries sustained on the 13th day of June, 1939, when an old oil field truck, which had been driven through the mud, pulled upon U. S. route 50 several miles west of Salem (at the intersection of a dirt road which runs north and south, with U. S. highway 50, in Marion County, Illinois), and proceeded in a westerly direction and a collision occurred with the car which plaintiff's intestate was driving. The testimony is in conflict, however, as to whether or not there was any red light on the rear of the truck, there being evidence produced on behalf of the plaintiff that there was no red light on the rear of said truck, and some evidence produced on behalf of defendants that there was a red light on the rear of such truck. The decedent was driving a car in a westerly direction upon said U. S. highway, route 50.

The evidence discloses that Leslie Wilson and John McCorkle, who were employees of the defendants herein, were working in the oil fields south and west of Salem, Illinois, for the defendant Company, and that somewhere around midnight on the night of the accident in question, the said Leslie Wilson left the place of his employment, driving a truck, and following him was the witness John McCorkle driving Wilson's car. The evidence further discloses that as the said Wilson approached route 50 from the south, on a dirt road, that when he got about six feet from the hardroad, he stopped his truck and he testified that he then looked in both directions and that when he looked to the west he observed an automobile coming from the west, which he estimated was traveling at a speed of about 20 or 25 miles per hour and was from 150 to 200 feet west of said intersection. This witness also testified that when he looked to the east he observed the car in which plaintiff's intestate was driving, and that he estimated that that car was a half to three-quarters of a mile away. The evidence discloses that after having made these observations, Wilson pulled out onto the pavement and turned to the left, and that at about the time he got his truck out on the pavement and shifted into second, he passed the car coming from the west, and that he then shifted into high, and that when he had driven between 150 and 200 feet to the west (at which time the

witness testified he was traveling at a speed of 25 miles per hour), the car being driven by Plaintiff's intestate struck the rear end of his truck with great force, causing his truck to leave the pavement and go into the ditch, and the car which plaintiff's intestate was driving ended up in front of his truck, headed north, in the ditch, with the back end of the car on the shoulder, but off of the pavement.

This witness further testified that after the collision the headlights and one rear taillight, were still burning, and the cab light. This witness further testified that in his opinion plaintiff's intestate's car was going at 75 or 90 miles per hour at the time it struck his truck, but that opinion seems to have been based almost entirely on the force with which his truck was struck.

The witness John McCorkle, called on behalf of the defendants, testified that when they left their work, between four and five miles southwest of Salem, at about midnight, they came north, that he was driving Wilson's car and following Wilson, and that at that time there was a light on the right-hand corner, a light on the left-hand corner, and one up on the left-hand side of the cab, back of the driver, and that the light on the right-hand corner didn't have a lens in it (it was a clear bulb), the light on the left-hand corner of the truck was a red lens, and the light on the back of the cab (being up back of the driver) was a red light.

This witness further testified that he drove along behind Wilson, following him closely as he had not been over that road before. This witness further testified that when Wilson got to highway 50 he drove up to the highway and stopped, and that he was there "just a time", and started up and pulled out and turned west; and that after Wilson had turned onto highway 50, he (McCorkle) just waited there until the road cleared, and then pulled out. This witness testified that he observed a car coming from the west and a car coming from the east, going west, and that he thought the car coming from the west was about 150 or 200 feet away when Wilson turned onto highway 50, and that that car drove on through and came on east; and that he also observed the car coming from the east and



and that it was between a half and three-quarters of a mile east when he observed it, and that in his opinion it was going 75, or 80 miles, or maybe maybe/a little under that, and it might have been a little over, when it passed him when he was waiting to drive onto the hard road.

The evidence in this case discloses that plaintiff's intestate sustained injuries in this accident, from which he died. The evidence further discloses that Plaintiff's intestate was a young man, 25 years of age, in good health, and engaged in the business of cleaner and presser, and that his income was about \$30.00 a week, and that he had contributed and was materially contributing to the support of his parents, and also was giving some financial assistance to a brother.

Several witnesses were called who gave varying testimony as to the kind and number of lights on the rear of the truck involved in this accident. Several witnesses also gave testimony as to the relative positions of the automobile and the truck shortly after the accident, and described the damage done to the car and to the truck.

No claim is made on this appeal that the judgment of the Court entered on the verdict, is excessive, nor is any error assigned on the admission or rejection of evidence in the trial of this case, nor is it contended that any error was committed by the Trial Court in the giving or refusing of instructions. The only assignments of error made and urged in this Court are: (1) The refusal of the Trial Court to direct a verdict in favor of defendants; and to allow the motion for judgment notwithstanding the verdict; and (2) That the judgment appealed from is contrary to the law and to the evidence.

In giving consideration to the first assignment of error it must be borne in mind that it is the well-settled law of this State that in considering a motion for a directed verdict or for a judgment notwithstanding the verdict, that if the evidence in favor of the plaintiff, standing alone and considered true, together with all legitimate inferences therefrom, the jury might not reasonably have found for plaintiff, that the Court cannot weigh the evidence (Blumb v. Getz, 366 Ill. 273, 277; Mesce v. City of Chicago, 301 Ill.App. 430).

In this case there is a conflict in the testimony and this Court has not the right to set such judgment aside, unless it is satisfied that it is manifestly against the weight of the evidence (People v. Dieckelmann, 367 Ill. 372; Jones v. Esenberg, 299 Ill. App. 551), nor are we persuaded that the judgment appealed from is contrary to the law and the evidence.

It is contended that plaintiff's intestate was guilty of contributory negligence that would bar a recovery by plaintiff in this case. The question of contributory negligence is ordinarily one of fact for the jury to decide under proper instructions. Contributory negligence becomes a question of law only when it can properly be said that all reasonable minds would reach the conclusion, under the facts stated, that such facts did not establish due care and caution on the part of the person charged therewith (Thomas v. Buchanan, 357 Ill. 277). The record in this case discloses no evidence that would make the question of plaintiff's intestate's exercise of due care and caution other than a proper question of fact for a jury.

We are persuaded, and so hold, that the judgment in this case is not against the manifest weight of the evidence, and, therefore, should not be disturbed. There was presented for determination by the jury in this case, a well-defined issue of fact and it has been passed upon by a jury, and a judgment of the Court entered upon the verdict of the jury, in favor of the plaintiff, and as a Court of Review, we have no right to substitute our opinion for that of the jury in a case of this nature so long as the verdict of the jury is supported by sufficient evidence (Avery v. Medaris, 272 Ill. App. 209).

There being no error in this Record that would in any wise warrant our interfering with the judgment of the Circuit Court of Marion County, and said judgment, in our opinion, being correct and proper, the same is hereby affirmed.

Judgment affirmed.

FILED

MAR 2 1941

David J. Mallick
CLERK OF THE APPELLATE COURT
FOURTH DISTRICT OF ILLINOIS

STATE OF ILLINOIS
APPELLATE COURT
FOURTH DISTRICT

October Term, A. D. 1941

Term No. 41021

Agenda No. 7

~~Publ in Full~~
JOHN DOWSON,
Plaintiff-Appellant,
v.
WALTER SMITH,
Defendant-Appellee.

Appeal from
Circuit Court
Marion County.

CULBERTSON, J.

313 I.A. 650²

This is an appeal from a judgment of the Circuit Court of Marion County, Illinois, against Plaintiff-Appellant, JOHN DOWSON, (hereinafter called Plaintiff), and in favor of the Defendant-Appellee, WALTER SMITH (hereinafter called Defendant). This cause was tried before the Court, without a jury.

This case arose out of an automobile accident which occurred on the 9th day of March, 1940, at which time the plaintiff was driving and operating a 1940 model Plymouth tudor sedan, in a southerly direction along route 51, at a point about three miles south of the Village of Patoka, in Marion County, Illinois. It was contended by the plaintiff that while he was driving his automobile in a southerly direction along route 51 that the defendant (who was also driving south on said route), after plaintiff had signalled his intention to pass the defendant, the said defendant failed to give way to the right and turned his car into the path of the plaintiff's automobile.

The evidence in this case discloses that as the plaintiff was driving south on said route, that his father-in-law was seated on the right-hand side of the car, in the front seat, and his brother-in-law, Clyde Ehrat, was sitting in the center of the front seat; that plaintiff's wife, and Mary Ehrat, Marie Holt, and a small daughter of the plaintiff, were riding in the back seat; and that

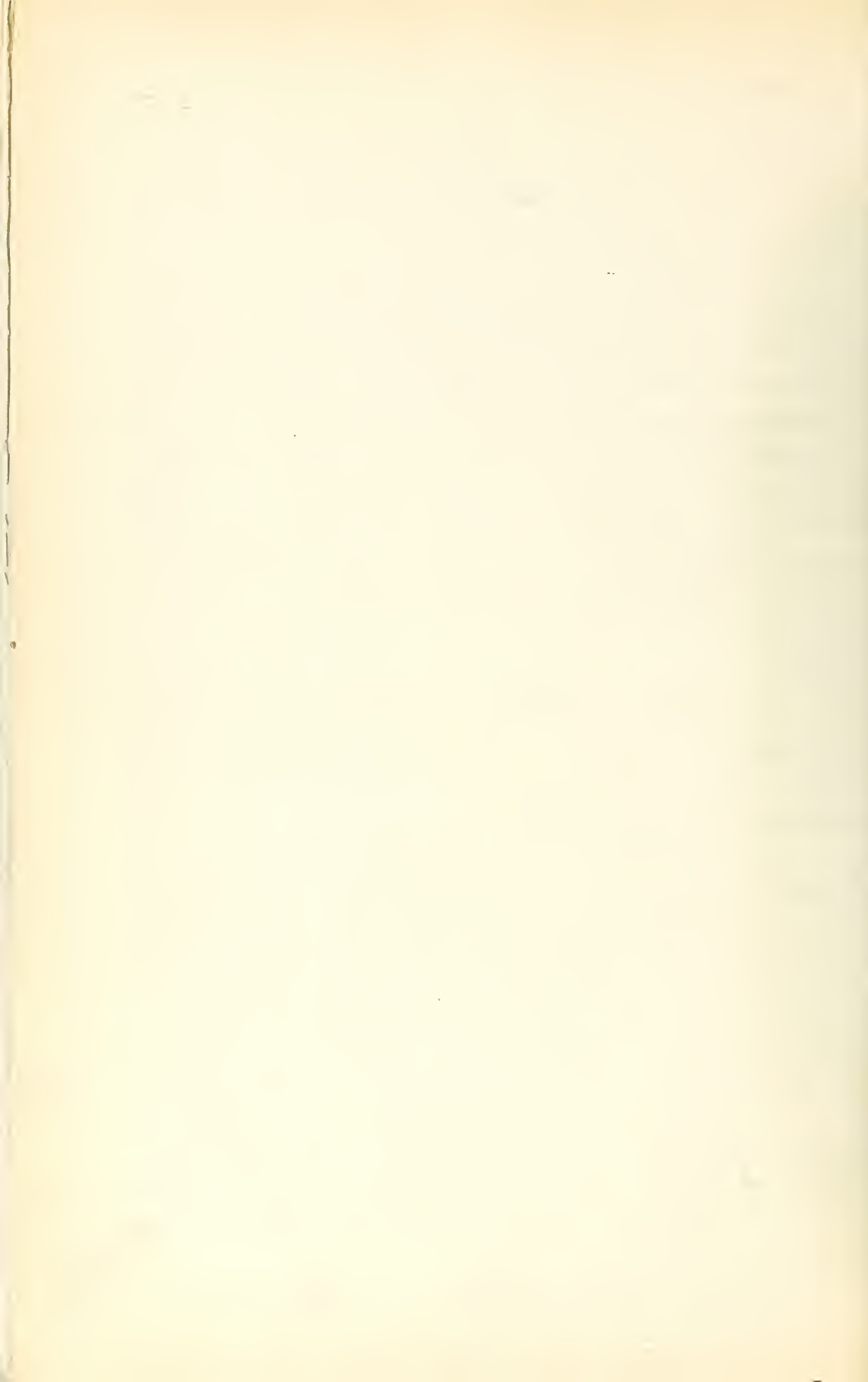
said party was then enroute to Salen to see the oil field and to visit a friend. The evidence further discloses that the defendant was driving and operating a Chevrolet coupe and was the only occupant of his car. The evidence discloses that it was a bright, warm day, and that the pavement was dry.

The plaintiff testified that when he first observed the defendant's car, he was driving approximately 45 miles an hour, and that when he came up behind the defendant's car and as he started to go around defendant's car, he sounded his horn twice, and turned out on the left side of the road; that when he was even with defendant's car, they were about 35 feet south of a bridge on route 51, and that there were guard rails north of the bridge; that as plaintiff was about even with the south end of the guard rail, defendant crowded him off of the pavement, and at that time defendant was coming to the left; and that just before plaintiff's car collided with the culvert, the defendant's car was on the left side of the black line. The evidence discloses that as the result of this accident, the plaintiff was injured and was taken to a hospital, that he remained there for some 26 days and had an operation as a result of the accident. The evidence does not disclose that plaintiff sustained any permanent injury.

The plaintiff's father-in-law testified that plaintiff sounded his horn twice as plaintiff started to pass the defendant's car, and that when he did so, the defendant "came in right across the road," and that plaintiff turned to the left to keep from hitting the defendant and hit the concrete culvert. This witness testified that plaintiff was going probably 45 or 50 miles an hour at the time of the accident, and that he "might have driven a little faster."

The witness, Clyde Ehrat testified that after plaintiff pulled out, the defendant pulled over the black line and in ahead of plaintiff's car. The ladies seated in the back seat of plaintiff's car also testified as to how the accident occurred from their observation of it.

Defendant, who was a hardwood lumber dealer, 58 years of age,



and residing at Patoka, testified, among other things, that on the day of the accident he was driving south from Patoka to his sawmill, which is located on the west side of the hard road, two and one-half miles south of Patoka. Defendant further testified that his sawmill was just west of a culvert, south of a bridge, and that the driveway into his sawmill was 17 feet wide; that as he approached the driveway he was driving between 15 and 20 miles per hour, and that he observed, through his rear view mirror, a car coming behind him, about 300 feet to the rear of his car, and that there was a car approaching him also, from the south, about three or four hundred feet to the south. Defendant testified that he was driving on the west, or right-hand side of the road, going south, and that he was on the south side of the bridge when he first knew that the plaintiff's car was going to pass him, and was at that time driving 15 miles an hour. Defendant further testified that at no time did he pull his car over east of the black line, but that plaintiff's car "grabbed hold" of his car and it "ran against him and went off to the left." The defendant further testified that the right end of plaintiff's rear bumper caught on the front side of defendant's left rear fender, next to the running board, and that immediately after defendant's car was caught by plaintiff's bumper that plaintiff's car hit the culvert on the left side of the road, with the left front wheel of plaintiff's car. The evidence further disclosed that marks on the pavement after the accident showed defendant's car had been dragged to the left toward the culvert on the east side of the road. Defendant testified that he did not hear any signal from plaintiff's car of any intention to pass, and that when he began to slow down he held his right hand up in the air and put his foot on the brake and pressed on the brake continuously, and that it was never his intention to go into the east lane on the highway, and he did not go into the east lane on the highway at any time.

Daniel Kinney, a witness called on behalf of the defendant, who resided at Salem, Illinois, and was employed by an ice company, testified that at the time of the accident he was about eight or

nine hundred feet north from the place where the accident occurred, and that he saw the accident as it occurred. This witness testified that he was in an automobile, going south from Patoka, and was just going to turn into a lane which led to his father's place, and which was about two blocks north of the bridge; that plaintiff's car passed him about 150 or 200 feet north of the lane where he was going to turn off, and that at the time plaintiff's car passed him, in his opinion, plaintiff was traveling between 60 or 65 miles an hour, and that it did not look to him as if plaintiff slackened his speed up to the time of the accident. This witness testified that he saw the two cars come together and that defendant's car was on the right side of the pavement, traveling south, and after the collision the cars went off angling across to the east side of the road. This witness further testified that the skid marks started a foot on the west side of the black line. He further testified that at no time prior to the accident was the defendant's car on the east side of the black line and that it didn't look as if defendant's car was going very fast.

Herman Wilken, of Patoka, another witness called on behalf of the defendant, testified that on the day of the accident he was at the saw mill of the defendant, about 100 feet west of the hard road, and that he was there waiting for Mr. Smith who had sent him there to load some lumber for him. He testified that he saw the defendant's car coming down the road when it was 300 feet north of the driveway (or, about 250 feet north of the bridge), and at that time it was on the right side of the road, going south, at a speed of about 20 miles an hour. He testified that he watched the defendant's car until the accident happened, and at no time did defendant drive over to the east of the black line. This witness further testified that plaintiff's car was about 300 feet north of the mill lot when he first observed it and, in his opinion, plaintiff was driving around 60 miles an hour, and that plaintiff hit the back end of defendant's car and went into the culvert. This witness further testified that he did not hear any horn sounded by the plaintiff.

An examination of the statement, brief, and argument of

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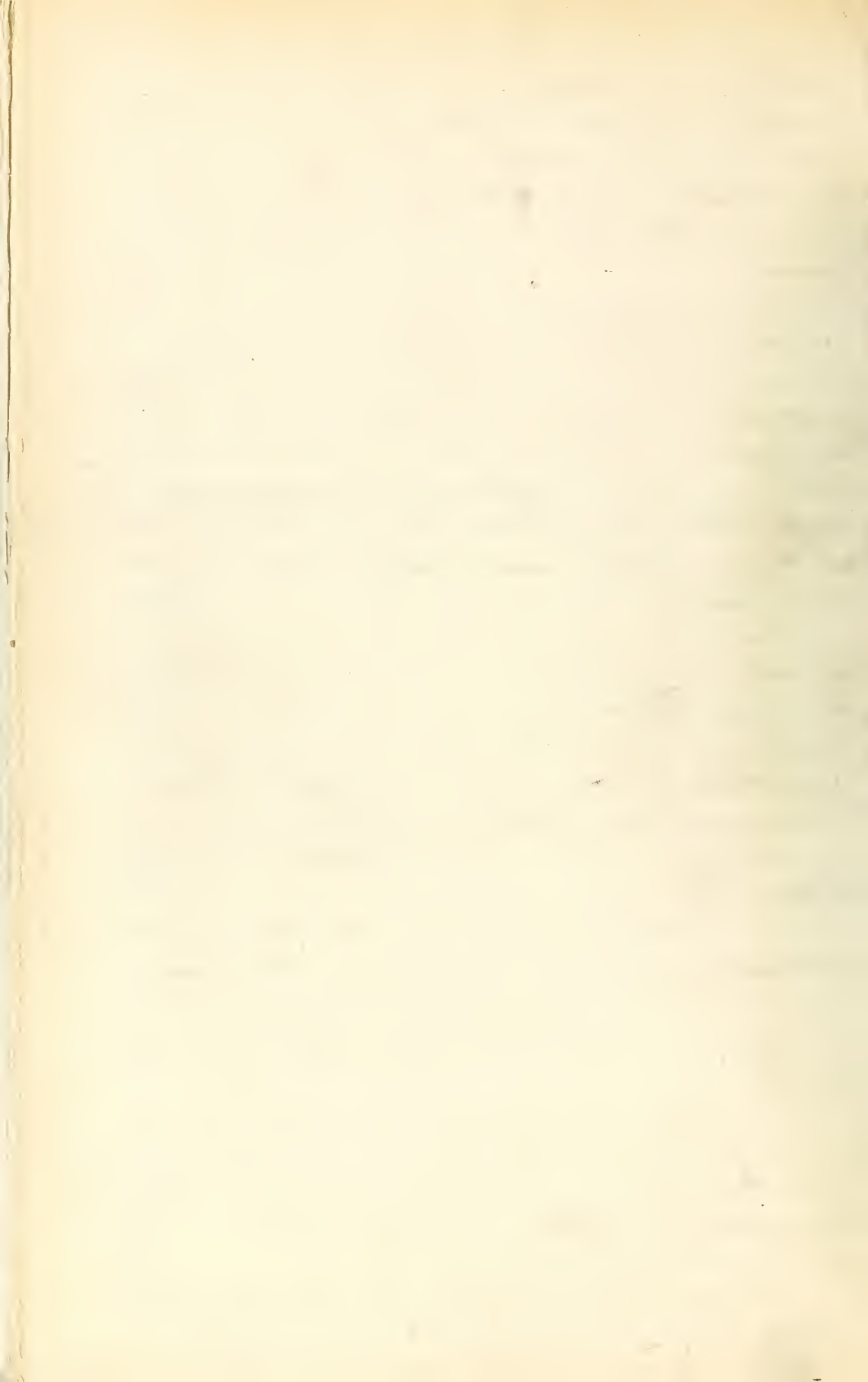
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JUDGMENT AFFIRMED.



Abstract

STATE OF ILLINOIS
APPELLATE COURT
FOURTH DISTRICT

FILED
OCT 2 1941
Daniel J. Mahoney
CLERK OF THE APPELLATE COURT
FOURTH DISTRICT OF ILLINOIS

October Term, A. D. 1941.

Term No. 41031

Agenda No. 15.

HORACE McCAUGHAN, Adminis-
trator of the Estate of
PETE McCAUGHAN, deceased,

Plaintiff-Appellee,

v.

STANLEY BOSWELL,

Defendant-Appellant.

Appeal from the

Circuit Court of

Union County, Illinois.

CULBERTSON, J.

313 I.A. 651 / 09

This is an appeal from a judgment in the sum of \$4,000.00 entered in the Circuit Court of Union County, in favor of Plaintiff-Appellee, HORACE McCAUGHAN, Administrator of the Estate of PETE McCAUGHAN, deceased (hereinafter called Plaintiff), and against Defendant-Appellant, STANLEY BOSWELL (hereinafter called Defendant).

This case was tried before a Court and jury, and a verdict of \$4,000.00 was returned by the jury. Thereafter a Motion for a New Trial was made, argued, and denied, and judgment was entered on the verdict from which judgment this appeal follows.

The complaint in this case charges the defendant with having been negligent in one of the following respects:

- (a) Driving at a greater speed than reasonable;
- (b) Driving a car with defective brakes;
- (c) Failing to turn to the left in passing a car going the same direction;
- (d) Negligently and carelessly managing his automobile and causing it to run into an automobile being driven by plaintiff's intestate while both of said automobiles were moving in an easterly direction, and using the south side of the highway.

The answer of the defendant denies the charges of negligence on the part of the defendant, and states that plaintiff's intestate was the cause of the accident by his negligence in suddenly stopping without giving a signal, or suddenly reducing his speed without giv-



ing a signal. Defendant urges in this Court that the judgment of the Circuit Court of Union County should be reversed for the reason that the verdict of the jury is clearly and manifestly against the weight of the evidence and that plaintiff's intestate was guilty of contributory negligence, and it is also urged that the Court erred in giving certain instructions to the jury at the request of the plaintiff, and that the verdict is excessive and not supported by the evidence.

This case arises out of an accident which occurred on October 28, 1938, at about eleven o'clock at night, on State Route 146, seven miles east of Anna, Illinois. State Route 146 is a concrete paved highway, running east and west, eighteen feet in width, with the center marked by a black line. At the place where this accident occurred visibility is limited due to the fact that there is a rise in the pavement in the direction in which the cars were going.

The evidence discloses there is a lunch room and filling station, called Locust Grove, on the north side of the road where the accident occurred and that provision is made for cars going either east or west to enter this station, the outside limits of the entrances being about 200 feet apart, said lunch room and filling station being about midway between said entrances.

Plaintiff's intestate was driving a 1929 model, Graham Paige, eastward on said route at the time of the accident, a Mrs. Cavender being seated in the front seat with him, holding a small boy on her lap, and in the rear seat and seated on the left-hand side was a Mr. Corn, and on his right, June Schutt. The defendant, Stanley Boswell, lived on a farm east of where the accident occurred and was returning to his home from Anna, Illinois, driving a Chevrolet Sedan.

From the evidence produced on behalf of the plaintiff, it appears that plaintiff's intestate was driving east on the highway, and as he approached the west entrance to Locust Grove, slowed down to turn into the restaurant for a lunch when other occupants

of the car called his attention to the approach of two cars, one from the east and one following them from the west, at very high rates of speed, and that instead of driving into the restaurant, plaintiff's intestate increased his speed and drove straight on down the highway and when he had reached a point about 50 or 60 feet west of the east entrance to Locust Grove, the car in which Plaintiff's intestate was riding was struck on the left rear end by the car driven by the defendant. It appears from the evidence that at that time plaintiff's intestate's car was on the south side of the paved highway and the force of the impact knocked plaintiff's intestate's car a distance of about 65 feet to the right, off the highway, and the car stopped with the front of the car facing west. The force of the impact was such that the left rear end of plaintiff's intestate's car was badly damaged, and plaintiff's intestate and Mr. Corn (both of whom were seated on the left side of the car) were killed.

It appears from the evidence plaintiff's intestate was an unmarried man, able-bodied, 29 years of age, residing with his father and mother, two brothers, and two sisters. The evidence disclosed he was employed as a miner's helper and contributed to the support of the family. The amount and extent of his contributions to the support of the family is disputed in this case, and proof along that line, we believe, was unduly and improperly restricted by the court when an objection was made and sustained to the testimony of Dorothy McCaughan Bell, a sister of plaintiff's intestate. Under the provisions of Section 2, Chapter 51 of the Illinois Revised Statutes (State Bar Edition, 1941), we believe this witness was competent for the purpose of testifying concerning contributions plaintiff's intestate had made to the support of the family from his earnings (Mann v. Mann, 270 Ill. 83), and while this Record does not disclose an offer of proof having been made in connection with this witness, we are disposed to hold that if the evidence as to support furnished by plaintiff's intestate to his family from his earnings is not as full and complete as it could well be, that the defendant

evidence in the Record that there were black marks, extending east on the road, 22 inches south of the black line dividing the center of the east and west highway, 65 feet, 3 inches long, and that these black marks started about midway of the two entrances to Locust Grove and extended easterly to the south and to the edge of the slab, and that there were skid marks on the shoulder that appeared to be an extension of the marks where plaintiff's intestate's car was overturned. There was also some broken glass on the pavement at about the same point.

In this case there is a conflict in the testimony, and this Court has not the right to set such judgment aside unless it is satisfied that it is manifestly against the weight of the evidence People v. Dieckelmann, 367 Ill. 372; Jones v. Esenberg, 299 Ill. App. 551; Graham v. Dressen, 292 Ill. App. 15.

A careful examination of the evidence in this case persuades us and we so hold that the judgment in this case is not against the manifest weight of the evidence and should not be disturbed. A Court of Review has no right to substitute its opinion for that of the jury in cases of this nature so long as the verdict of the jury is supported by sufficient evidence (Avey v. Medaris, 272 Ill. App. 209).

We do not find any evidence in this Record that would warrant this Court in holding that plaintiff's intestate was guilty of contributory negligence, as a matter of law. Questions as to what is the proximate cause of an injury, as to contributory negligence, as to the credibility of witnesses, as to the weight to be given evidence heard on the trial and the inferences to be drawn from the facts proved, are ordinarily all questions for the jury to pass upon, and not for the Court to decide (Malloy v. Chicago Rapid Transit Co., 335 Ill. 164).

We have examined all of the instructions, the accuracy of which are challenged on this appeal, and we are persuaded, and so hold, that there was no reversible error committed in the giving of any of such instructions. There were ten instructions given on

behalf of plaintiff and fifteen instructions given on behalf of defendant. Considered as a series these instructions, in our opinion, correctly instructed the jury.

It is finally urged that the verdict is excessive and not supported by the evidence. We do not find ourselves in accord with this contention, and it seems to us, and we so hold, that a \$4,000.00 verdict in this case was not excessive.

There being no error in this Record that would justify a reversal of this case, and it appearing to us that the judgment should be affirmed, it is, therefore, hereby accordingly affirmed.

Judgment affirmed.

FILED

MAR 2 1942

David J. Mallitt
CLERK OF THE APPELLATE COURT
FOURTH DISTRICT OF ILLINOIS

Abstract

STATE OF ILLINOIS
APPELLATE COURT

October Term, A. D. 1941.

Term No. 41034

Agenda No. 16.

E. FRANK JONES, H. P. DUNN,
GEORGE D. DALY, ROY MILLER,
BERNARD C. PATTERSON,
FOREST G. WIKHOFF, WM. D.
SNYDER, R. S. WAGGONER,
JOS. G. WEBSTER, ARTHUR C.
JONES, MARY J. WEBSTER,
RICHARD E. ECKERT, DAVID
H. MOREY, N. S. HENNIGAN
and SELMA B. BEARE,

Plaintiffs-Appellees,

v.

JOS. GREENSPON'S SON PIPE
CORPORATION, a Corpora-
tion,

Defendant-Appellant.

Appeal from the

Circuit Court of

Clinton County,

Illinois.

313 I.A. 651²

CULBERTSON, J.

This is an appeal from a judgment in the amount of \$2500.00, entered in the Circuit Court of Clinton County, in favor of Plaintiffs-Appellees, E. FRANK JONES, H. P. DUNN, GEORGE D. DALY, ROY MILLER, BERNARD C. PATTERSON, FOREST G. WIKHOFF, WM. D. SNYDER, R. S. WAGGONER, JOS. G. WEBSTER, ARTHUR C. JONES, MARY J. WEBSTER, RICHARD E. ECKERT, DAVID H. MOREY, N. S. HENNIGAN and SELMA B. BEARE (hereinafter called Plaintiffs), and against Defendant-Appellant, JOS. GREENSPON'S SON PIPE CORPORATION, a Corporation (hereinafter called Defendant). This cause was tried before the Court, without a jury.

The complaint in this cause alleged that the defendant, on or about March 15, 1939, and on other days between that date and the time of the commencement of the suit, with force and arms and without leave or license, wrongfully and unlawfully entered onto the leasehold premises belonging to the plaintiffs and then and there did wrongfully and unlawfully commit the following acts, to-wit: Removed the tubing, rods and equipment in the oil well on

said premises; shot the casing in said well and removed the casing, which was cemented therein; ruined said oil well; and attempted to plug said oil well and ruin said oil well as a producing well; to the loss and damage of the plaintiffs of the sum of \$10,000.00; and that by reason of the wrongful acts of the defendant, the plaintiffs were deprived of the use of said oil well and the oil to be produced therefrom, to the damage of the plaintiffs in the sum of \$10,000.00. The suit was instituted by E. Frank Jones, who originally acquired the lease and drilled the well, and by all those to whom he had made assignments.

The defendant filed an answer and counter-claim denying that the plaintiffs, or any of them, were the owners of the pipe and casing mentioned in the complaint, or that they were a part of the lease, and set out that by virtue of the terms of a certain conditional sales contract entered into between the plaintiff, E. Frank Jones, and the defendant as the seller, which conditional sales contract was made a part of the amended answer, plaintiffs never had any right, title, or interest in or to the pipe and casing in question, and generally denied the other allegations of plaintiffs' complaint. The defendant's counterclaim against E. Frank Jones alleged that the said E. Frank Jones was indebted to the defendant in the amount of \$231.23, together with interest and costs. The Court, upon the hearing, found adversely to the plaintiff in the counter-claim, and found in favor of the plaintiffs in the original suit in the amount of \$2500.00.

From the evidence in this case it appears that the plaintiffs, E. Frank Jones, leased lot 16 in Block 7 of the Second Home Terrace Addition, Clinton County in the city of Centralia and cause to be drilled thereon an oil well. The oil well in question in this case, when first drilled, swabed the first day, about 30 barrels and the second day, about 25 barrels. It appears that when the cable tool men were drilling the well into completion, they dropped the bailer in the hole, and after this happened, the production of the oil went down to only a few barrels per day. Pumping then ceased and

cable tools were put on the hole in an effort to drill up the bailer. At about this time the plaintiff, E. Frank Jones, ceased working on this well and went over into Fayette County (according to his testimony) to do some work there in an effort to earn and procure money to do further work on the well in question in this case. While the plaintiff Jones was in Fayette County, it appears from the evidence, the defendant herein became impatient about the money owed to it by Jones for certain pipe that had been used in connection with the well in question and without any authority, so far as the Record in this case discloses, the defendant went upon the premises and proceeded to shoot and pull the pipe from the well, and in so doing the well was ruined. It also appears that in removing its pipe, the defendant not only took pipe that had been sold by it to plaintiff Jones, but also took certain other property about the premises, upon which it certainly could not have had any claim. It appears from the evidence that the well in question was drilled in proven territory, and that there were other producing wells in close proximity of the well in question.

Defendant, in this Court contends it is entitled to a reversal in this case for several reasons, (First), That all necessary parties were not properly before the Court either as plaintiffs or defendants. This contention being advanced for the reason that the lessor (the owner of the usual 1/3th royalty) is not made a party to this suit. No authority has been brought to our attention holding the lessor to be a necessary or a proper party to this proceeding. Plaintiffs, as the owners of the leasehold estate, are claiming damages for wrongful trespass on the part of the defendant in destroying its value. The landowner had no interest in this leasehold estate and, in our opinion, was neither a proper, nor a necessary party to this Common Law action.

Defendant also contends that it had a legal right to remove the casing in question for the reason that it was sold on a conditional sales contract and had not been paid for, and defendant was within its right in removing it. Defendant's contention in this

regard, we do not believe is well founded as the evidence discloses that this casing, which was sold by the defendant to the plaintiff Jones on a conditional sales contract, was to be used and cemented in this well, and that it would be used in the well, and having been so affixed it could be only partially removed by using high explosives to shoot it off, and to attempt that course would be to occasion damage to the casing itself, and damage to the well. Under the ruling announced in the case of Sears, Roebuck & Co. v. Piase Bldg. & Loan Assn. 276 Ill. App. 379, at page 393, we are persuaded, and so hold, that the defendant was not within his rights in removing the casing and occasioning the resultant damage.

Defendant earnestly contends in this Court that the well in question was an abandoned well at the time of the removing of the casing. An examination of the evidence in this regard persuades us, and we so hold, that there is abundant evidence in the record that the well was not an abandoned well.

Defendant also contends that, assuming the plaintiffs had a right to recover, there is no evidence to support the judgment of the Trial Court in excess of the salvage value of the well in question. We have carefully examined the evidence in connection with the question of damages in this case and from that examination are of the opinion that there is abundant testimony in the Record upon which the Court could have found in favor of the plaintiffs in the amount of \$2500.00.

It is finally contended that the Court below committed error in refusing to allow the defendant a judgment against plaintiff Jones on its counter-claim. A careful consideration of this contention brings us to the conclusion that it is without merit.

This case was tried before the Court, without a jury, and the Trial Court had an opportunity to and did observe the demeanor of the witnesses while they were testifying, and we would not be at liberty to substitute our opinion for that of the Trial Court on these questions of fact, unless we are able to say that the finding of the Trial Court is manifestly against the weight of the evidence

Moore v. David J. Molloy Co., 222 Ill. App. 295, 293; People, etc.
v. C. & E. I. Ry. Co., 253 Ill. App. 535, 540; MacCracken v. First
Nat'l Bank of Wheaton, 204 Ill. App. 20, 21; Henkins v. Colley,
106 Ill. App. 522).

A careful consideration of the evidence persuades us, and
we so hold, that the finding of the Trial Court is not against the
manifest weight of the evidence, but finds abundant support therein.

There being no error in this Record, the judgment of the
Circuit Court of Clinton County, is hereby affirmed.

Judgment affirmed.

FILED

MAR 2 1942

David J. Mallitt
CLERK OF THE APPELLATE COURT
FOURTH DISTRICT OF ILLINOIS

STATE OF ILLINOIS

APPELLATE COURT

October Term, A. D. 1941

Abstract

Term No. 41012

Agenda No. 9

ELLA FREEMAN,
Plaintiff-Appellant,
vs.
THE LEADER MERCANTILE
COMPANY, a Corporation,
Defendant-Appellee

Appeal from the
City Court of the
City of Granite City.

692
111

Dady, J.

313 I.A. 652'

Plaintiff appeals from a judgment for defendant notwithstanding the verdict. The verdict was in favor of the plaintiff and assessed her damages at \$4500.

Plaintiff was severely injured on November 9, 1930, through falling on a stairway in a two story building in Granite City. The building was and for several years had been occupied by defendant as a general store, and plaintiff was then in the store as a customer.

This stairway led from the first to the second floor and was made up of two sets of stairs, and a landing at about the center of such stairs. Four wooden steps about six feet wide led from the first floor to the landing. The landing, also of wood but covered with linoleum, was about eight feet wide and ten feet long. A similar set of steps led from the landing to the top floor. There was no covering on the steps and no metal on the edge of the steps. The kind of wood used is not shown. The accident happened while plaintiff was descending or about to descend from the landing to the lower floor.

Plaintiff testified that she descended from the second floor to the landing and then began to descend from about the center of the edge of the landing to the first floor; "that there

are four steps from the first floor to the landing and the landing makes another step"; that in so descending she first stepped from the landing with her right foot and such right foot slid off the rounded edge of the top step, and she then fell on the stairs; that she started to slip on the edge of the landing; that her right leg doubled under her and was broken; that the heel of her left shoe was torn off in the fall; that while sitting or lying on the stairs after the fall she looked back to see what caused the fall and noticed that the landing was covered with old linoleum, and that the linoleum on the edge of such landing was worn off for a distance of about a foot, and the wood underneath was worn slick; that the steps were so worn that they were rounded on the outer edge; that "when I say the step was worn I mean a piece was worn off of it, taken out of the wood" on the landing; that the steps were worn off and slick from natural wear.

The proofs show that the stairway had been in the same general condition for at least five years, and during such time had been constantly used by a great many customers.

The only question presented is whether the trial court erred in entering the judgment notwithstanding the verdict, and the foregoing is all of the testimony material to such question.

Defendant does not contend that plaintiff was not in the exercise of due care or that she was not injured as a result of the accident, but only contends that plaintiff "failed to establish legal negligence."

In passing on a motion for a judgment notwithstanding the verdict the rules applicable on a motion for a directed verdict should be applied. The evidence must be considered in its aspect most favorable to the plaintiff, together with all reasonable inferences to be drawn therefrom, and the court is required to assume that the evidence favorable to the plaintiff is true. The evidence must not be weighed and all contradictory or explanatory circumstances must be rejected. The only inquiry is whether there is any evidence fairly tending to prove the plaintiff's complaint.

If there is any evidence fairly tending to prove the complaint the motion must be denied, even though the court is of the opinion that a verdict for the plaintiff, if given, must be set aside as against the preponderance of the evidence. (Synwolt v. Klank, 296 Ill. App. 79; Hunter v. Troup, 315 Ill. 293; Osborn v. Leuffgen 312 Ill. App. 251.)

If a reasonably prudent person might, and ordinarily would, foresee that the omission to do a certain act, or the commission of an act in a certain way, would result in injury to another, an injury to another does follow as a result thereof, such act of omission or commission is negligence and the proximate cause of the injury. (Wintersteen v. National Cooperage Co., 361 Ill. 95.) Where the facts are such that reasonable men of fair intelligence may draw different conclusions, the question of negligence must be submitted to the jury, (C & NW Ry v. Hansen, 166 Ill. 623), and, if negligence exists, its degree, whether slight, ordinary or gross, must always depend upon the evidence, and is not to be determined by the court as a question of law, where there is evidence tending to prove the particular fact. Wabash Ry. Co. v. Brown, 152 Ill. 484.)

Another rule of law applicable to this particular case is that it was the duty of the defendant to exercise ordinary care to maintain such stairway in a reasonably safe condition (Pollard v. Broadway Central Hotel Corp., 353 Ill. 312).

The specific charge of negligence in the complaint is that the defendant negligently kept and maintained the stairway in a dangerous and defective condition, in that the steps were worn, depressed, uneven and parts thereof worn and broken away, causing said steps to become slick and slippery.

Applying the foregoing rules of law, and assuming the testimony most favorable to the plaintiff to be true, as we are required to, considered in its aspect most favorable to the plaintiff, it is our opinion that reasonable men of fair intelligence might draw different conclusions from such evidence, and it is our

opinion that there is some evidence fairly tending to prove that the landing was covered with old linoleum, that the linoleum on the edge of the landing was worn off for a distance of about a foot, and the wood underneath was worn slick, that the steps were so worn that they were rounded on the outer edge, that the steps were worn slick and slippery from natural wear and that plaintiff slipped and fell and was injured because of such slippery condition of the stairs and landing. We are also of the opinion that the jury would have been justified in finding that such condition of the steps and landing had existed for such a length of time that the same should have been discovered and remedied by the defendant in the exercise of reasonable care.

We are therefore of the opinion that the plaintiff made a prima facie case of actionable negligence, and that the trial court erred in entering the judgment in question. To hold otherwise would put us in the position of arbitrarily passing on the weight and sufficiency of the evidence, which we should not do.

Many floor and stairway cases have been cited. In no Illinois case were the facts very similar to the facts in the instant case, and we do not consider it useful or helpful to enter into any detailed discussion of such cases. Of the cases cited, Bennett v. Jordan Marsh Shoe Co., 216 Mass. 550, 140 N. E. 479, is the closest on the facts. In that case the court said: "There was * * * evidence that the outer edge of the treads where the plaintiff fell had been permitted by defendant to wear smooth and to become rounded and slippery; and the questions whether the treads had become defective and whether that condition could have been discovered by proper inspection were for the jury." In Acme Harvester Co. v. Chittick, 230 Ill. 558, the court said: "There is, however, found in this record ample evidence, if true, which tends to establish that the floor immediately in front of the machine upon which the appellee was at work was worn and was smooth and slippery. Where there is evidence in the record which



fairly tends to support a cause of action, this Court cannot weigh the evidence, but must hold, as a matter of law, that the plaintiff has sustained his cause of action. We are therefore of the opinion that the Circuit Court did not err in declining to take the case from the jury."

The judgment of the city court is reversed and the cause is remanded to such court with directions to overrule the motion of the defendant for a judgment in favor of the defendant notwithstanding the verdict, and to pass upon the motion for a new trial, if one shall be made; and if such motion for a new trial is overruled, or if a motion for a new trial is not made, to then enter judgment on the verdict in favor of the plaintiff.

Reversed and remanded with directions.



FILED

MAR 2 1941

David J. Mallitt
CLERK OF THE APPELLATE COURT
FOURTH DISTRICT OF ILLINOIS

Abstract

IN THE
APPELLATE COURT OF ILLINOIS
FOURTH DISTRICT
OCTOBER TERM, A. D. 1941

Term No.
41020

Agenda
No. 25.

A. H. SEBASTIAN,
Plaintiff-Appellant,
SCHOOL DIRECTORS OF DISTRICT
NO. 17, COUNTY OF MARION
AND STATE OF ILLINOIS
Defendants-Appellees

Appeal from the
Circuit Court of
Marion County.

702
313 I.A. 652²/112

Dady, J.

Plaintiff, A. H. Sebastian, brought this suit against the School Directors of District No. 17 of Marion County, Illinois to recover the sum of \$275.41 for the payment of school supplies furnished by the plaintiff to the district. The cause was heard before the court without a jury and resulted in a judgment for the plaintiff for \$175.41. Plaintiff has taken this appeal. His only contention here is that he is entitled to a judgment for \$275.41 and not \$175.41 as entered by the trial court. The defendants have not followed plaintiff's appeal to this court.

A brief statement of the facts is essential. Plaintiff was engaged in the business of selling school supplies and employed one W. L. Jackson as his salesman. Jackson met the three directors at the of the district/school in an effort to sell school supplies to the district. He failed to make a sale at this meeting. However, several days later (but not at a regular or special or adjourned meeting of the directors) he met two of the directors and secured their written order for the supplies in question. The third director was not present when the order was signed and did not thereafter at any time sign, approve or ratify the order. Nor was such order thereafter ever ratified or approved by the directors at a

regular or special or adjourned meeting. The supplies listed in the order were delivered to the district with an invoice. The items of supplies and the prices therefor listed in the written order corresponded with the invoice except for an item of sweeping compound amounting to \$3.87 which was not included in the order but was added to the invoice. The aggregate of the prices listed in the invoice amounted to \$275.41, which is the amount plaintiff claims he is entitled to recover.

To support his contention plaintiff argues that the written order signed by the two directors constituted a binding agreement on the part of the district to pay the prices listed in the order. We cannot agree with this contention. At the time the two directors signed the order they had no power to act for and in behalf of the district. At the time they signed such order they were acting separately and individually and not as a body regularly convened at a regular or special or adjourned meeting. They acted in direct violation of the statute then in force, which provided that no official business should be transacted by the directors except at a regular or special meeting. (Chapter 122, Paragraph 119, Illinois Revised Statutes, 1939). It was to correct the very practice followed in this case by the plaintiff's salesman and the two directors that the statute referred to was enacted. We hold that the written order had no binding effect as a contract on the district. (Crawford v. Board of Education District No. 98, 215 Ill. App. 198). It follows that the prices listed for the supplies in the order cannot control or fix the amount of plaintiff's recovery in this case.

Plaintiff also urges that in any event he is entitled to recover the reasonable value of the supplies. It is true that if the plaintiff is to recover in this case he must rely upon the principle that where a municipal corporation has received the benefits under a contract which was merely ultra vires, that is a contract which was within the general powers of the corporation to

make but which was void because the power was not properly exercised, such corporation is bound to pay the reasonable value of the property received by it in an action based upon a quantum meruit. (People v. Spring Lake District, 263 Ill. 479; Stripe v. Yager, 348 Ill. 362.)

Plaintiff introduced evidence tending to show that the prices listed for the supplies in the invoice and order represented the reasonable and fair cash market value of such supplies at the time they were delivered to the district. He contends that there was no evidence to the contrary which would justify the action of the trial court in reducing his claim to \$175.41. We have examined the record and find that there was evidence introduced by the defendant tending to support the trial court's findings in this regard. The rule is that where a case is tried before the court without a jury, unless a reviewing court can say that the findings of the trial court are palpably against the weight of the evidence, such findings will not be disturbed. (Winnetka Park District v. Hopkins, 371 Ill. 46). We are unable to say that it was manifestly against the weight of the evidence for the trial court to find the reasonable cost of the supplies was only \$175.41, and accordingly conclude that the judgment of the trial court should be and is affirmed.

Judgment affirmed.

Abstract

APPELLATE COURT

FOURTH DISTRICT

Term No.
41023

October Term, A. D. 1941.

Agenda
No. 17.ST. ANTHONY'S HOSPITAL OF THE
SISTERS OF ST. FRANCIS, INC.,
Plaintiff-Appellant,

vs.

THE COUNTY OF FAYETTE,
Defendant-Appellee,
andTHE TOWN OF AVENA IN THE SAID
COUNTY OF FAYETTE,
Defendant-Appellee.

Appeal from the

Circuit Court of

Fayette County,

Illinois

313 I.A. 653

DADY, J.

Plaintiff brought suit against the County of Fayette and against the Town of Avena in said county for hospitalization services rendered one Lautzenheiser, hereafter referred to as "the patient," from March 4th, 1939, to December 25th, 1939. The case was tried without a jury and the trial court entered judgment for the defendants. Plaintiff appeals. The complaint, in the alternative, asked for judgment against one defendant or the other.

In his printed brief and argument counsel for plaintiff says the Town of Avena is not liable, but contends that the trial court erred in entering judgment for the defendant county.

The patient, aged 64 years, lived and worked in Avena township, in the defendant county, for about four or five months before his illness. Before that his home was in Oklahoma. Shortly before his illness he had been employed for a short time at a tavern in such township, but his employment had ceased on a Thursday. The following Saturday he visited the tavern and on leaving fell and injured his leg. Some one helped him into a cabin back of the tavern where he was put in bed. On the following Monday a local doctor, at the request of one of the tavern-keepers, Matheny or Nally, examined him and prescribed some medicine. The doctor testified that a few days later the patient had developed

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David J. Mallitt

CLERK OF THE COURT



a cold, had a temperature of 103½ degrees, was threatened with pneumonia and was a very sick man, and the doctor advised that the patient be taken to a hospital and should have a trained nurse. Such doctor was paid for his services by the tavern-keepers. The following day, March 4, 1939, the patient was taken, evidently by or at the instance of the tavern-keepers, to the hospital of the plaintiff where he received the services sued for.

At the time of leaving the hospital he was able to walk with the aid of crutches, and at such time the supervisor of Avena township furnished him a coat and hat and a "one-way" bus ticket to Okalhoma.

Neither tavern keeper testified. No one testified as to what transaction or conversation took place at the time the patient entered the hospital, except as shown by the testimony of the witness Ruedger hereinafter referred to. The hospital record of his entry, admitted without objection, contains this statement, "James B. Nally will make arrangements & be responsible for the bill."

The patient testified that at the time of entering the hospital he was delirious and had no recollection of entering the hospital and did not know how he got there; that it was several weeks before he remembered anything; that at the time of receiving the injury "I did not have any money at all. Probably had three or four dollars. Other than that I didn't own any property." There is no testimony to the contrary.

Ruedger testified that he had been looking after collections for the plaintiff and for the local doctor's clinic since 1939; that he saw the patient at the hospital at least twice a week; that during all of the first two or three weeks it was impossible to hold an intelligent conversation with him; that after the patient partially regained control of himself and late in March, 1939, the witness first learned that the patient had no finances.

Ruedger further testified that he first talked with the

supervisor of Avena township at the latter's home sometime early in May, 1939, after the patient had been at the hospital about two months; that he then told the supervisor that the patient was desperately ill and would need either county or township support on his further hospitalization and medical attention; that the supervisor replied that he did not know the man but would consult the State's Attorney; that thereafter he saw the supervisor several times, but the latter did not feel the township was responsible because the man had not been "pauperized".

Ruedger further testified that at the time the patient was received in the hospital it was understood the hospitalization service would be covered by insurance and that after he found the insurance did not cover the patient the witness went to the supervisor.

The then supervisor of Avena township testified that he was not acquainted with and never saw the patient; that he first learned of the patient being in the hospital when he received a bill for \$525. from the hospital for six months treatment; that later Ruedger came to see him "once in a while" about the bill; that "I know Lautzenheiser was in the hospital from the first time I talked with Ruedger"; that he first talked with Ruedger about six months before the patient left the hospital; that such first conversation with Ruedger took place about "six or eight months before he left the hospital"; that "I did not take any action upon the bill when it was first presented to me, and I never took any action after I talked with Ruedger. I presented the bill to the county and it came up before the board." He further testified that he never made any promise to the hospital that he would take care of the services in question.

An itemized statement was introduced in evidence without objection, which showed each day's charge for such hospitalization, and it was proven that the charge of \$2.50 per day was reasonable.

The action of the plaintiff against the defendant county

is based on Paragraph 25, Section 24, Chapter 107, Illinois Revised Statutes, 1939, which reads as follows:

"When * * * any person not coming within the definition of a pauper, of any * * * county * * * shall fall sick or die, not having money or property to pay his board, nursing and medical aid or burial expenses, the overseer or overseers of the poor of the * * * town * * * in which he may be shall give, or cause to be given to him such assistance as they may deem necessary and proper * * *; and the county shall pay the reasonable expense thereof, which expenses of board, nursing, medical aid * * * may be recovered * * * from the county of which he is a resident, in an appropriate action."

Section 18 of the same statute made the supervisor of the township in question the ex-officio overseer of the poor of such township.

In our opinion the evidence clearly shows that when the patient was admitted to and while he was in the hospital he did not have sufficient money or property to pay his hospitalization, and was within the class of persons entitled to hospitalization under Section 24 of the Paupers Act. (See Rock Island County v. App, 118 Ill. App. 521; County of Kankakee v. Town of Manteno, 63 Ill. App. 365; Buckmaster v. County of Effingham, 302 Ill. App. 353.) Although he had previously earned his living and was not technically a pauper, the only property he had at the time of entering the hospital was three or four dollars, and the only moneys he actually received thereafter was \$25. insurance.

The cases have dispensed with the necessity of prior notice to the overseer of the poor, where hospitalization or medical assistance is urgently required, and it is not feasible to notify the overseer prior to the giving of the assistance to the needy person. The same cases either hold or indicate, however, that notice must be given such overseer within a reasonable time after the emergency treatment begins. (See County of Fayette v. Morton, 53 Ill. App. 552; County of Clinton v. Pace, 59 Ill. App. 576; County of Winnebago v. City of Rockford, 61 Ill. App. 656; County of Madison v. Haskell, 63 Ill. App. 657; City of Chester v. County

of Randolph, 112 Ill. App. 510; Deason v. County of Williamson, 188 Ill. App. 316.)

The basis of the decisions which allow recovery without notice is that the emergency shown in each of such cases dispensed with the necessity of notice. Thus in County of Christian v. Rockwell, supra, a boy had been shot in the leg, making necessary prompt amputation, and "there was no time to apply for aid to any county official;" in County of Clinton v. Pace, supra, a man's leg was broken, and immediate treatment was needed; and in Deason v. County of Williamson, supra, the court said, that victims of a cyclone within the class in question could be treated by a physician "Where prompt and immediate action is required without notice to or permission from the supervisor."

The plaintiff seeks to justify its failure to more promptly notify the overseer of the poor on the ground that an emergency existed when the patient was received at the hospital, but the undisputed evidence shows that such failure was not in fact based on any emergency whatever. The principal witness for the hospital, Ruedger, made this plain. He testified that at the time the patient was received it was understood that the hospital services would be covered by insurance from some source, that that was where the plaintiff was looking for compensation at that time, and that after the witness found out that insurance did not in fact cover the patient, then the witness went to the overseer of the poor.

It is therefore our opinion that the trial court properly disallowed the claim of the plaintiff for hospitalization prior to the time when the overseer of the poor was actually notified of the hospitalization being given.

The evidence is conflicting as to when such overseer was first advised of the services rendered and being rendered. On this question only two witnesses testified, viz., the overseer, who testified for the defendant, and Ruedger, who testified for the plaintiff. The testimony of the overseer most favorable to the

defendant is that it was six or seven months before he learned that the patient had received and was receiving such treatment. Ruedger testified that he first advised the overseer early in May, 1939, after the patient had been at the hospital about two months. Although the overseer contradicted himself by later testifying that his first conversation with Ruedger was about six months before the patient left the hospital, the question of fact as to when such overseer was first advised was primarily a question for the trial court to determine. In any event the undisputed evidence is that the overseer was duly notified at least six or seven months after the patient entered and about three or four months before he left the hospital, yet the supervisor, after being notified, took no action except to disclaim liability. His inaction under the circumstances did not exempt the county from liability for the services rendered after the overseer was actually notified, and the trial court should have entered judgment for the plaintiff for such services rendered during such period. (Seagraves v. City of Alton, 13 Ill. 386.)

Defendant argues that "at the time of the patient's confinement the evidence discloses an agreement was entered into by and between the agent of the hospital and one James B. Nally, by the terms of which Nally agreed to pay any hospital bill which the patient might incur," and that therefore plaintiff was not entitled to any recovery whatever. This argument amounts to a mere inference or conclusion based only on the entry on the hospital record heretofore quoted and on the statement in the plaintiff's brief (though not in the record) that Nally was present when the patient entered the hospital. We see no merit to this contention. Assuming, that Nally did agree to pay such bill at the time the patient entered the hospital, the fact remains that the bill was not paid, the patient continued to be in need of and to be entitled to hospitalization at the expense of the county, and it is not denied that eventually the plaintiff, through its agent Ruedger, notified the

overseer that the patient was desperately ill and needed either county or township support for his further hospitalization. It then became the duty of the overseer to see that relief was given, which he did not do. From that time on the defendant county was liable for the relief thereafter given. Although he was in Effingham county when he received the hospitalization, he was still a resident of Fayette county and entitled to relief from such county. (Rock Island County v. App, 118 Ill. App. 521.)

As to the defendant township the judgment is affirmed.

As to the defendant county, the cause is reversed and remanded for further proceedings consistent with this opinion.

Approved in part, but reversed and
remanded with directions.



Abstract

STATE OF ILLINOIS
APPELLATE COURT
FOURTH DISTRICT

FILED

1941 2
David J. Mallitt
CLERK OF THE APPELLATE COURT
FOURTH DISTRICT OF ILLINOIS

October Term, A. D. 1941

Term No. 41030

Agenda No. 5

KASSLY UNDERTAKING COMPANY)	
and JOHN KASSLY,)	
Plaintiffs-Appellees,	)	Appeal from the
	)	City Court of the
vs.	)	City of East St. Louis
	)	St. Clair County,
THE FLXIBLE COMPANY, a Corpora-	)	Illinois.
tion,)	
Defendant-Appellant.)	

DADY, J:

313 I.A. 653²

Defendant appeals from a judgment for Nine Hundred Sixty (\$960.00) Dollars, rendered against it in an attachment proceeding.

As a basis for the attachment proceedings, an affidavit made by John Kassly was filed with the clerk of the trial court on April 14, 1941, in which it was alleged that the defendant, a non-resident corporation, had sold an ambulance to the plaintiff under the name and style of Kassly Undertaking Company, and had warranted it to be constructed of first-class materials and workmanship, and that the warranty had failed to the extent of Nine Hundred Sixty (\$960.00) Dollars. In the caption of the affidavit the plaintiff was described as "Kassly Undertaking Company" and the affidavit was signed "Kassly Undertaking Company by John J. Kassly, affiant".

On April 18, 1941, defendant filed its limited appearance, and motion to dismiss the suit and quash the writ on the ground that the affidavit purported to be signed by the Kassly Undertaking Company by its agent and that it did not appear in the affidavit that the person who signed it was the agent of the plaintiff. The denial of this motion by the trial court is the first error assigned by defendant.

Section 2 of the Attachment Act, Illinois Revised Statutes, Chapter 11, Paragraph 2, provides that "to entitle a creditor to such a writ of attachment, he or his agent or attorney shall make and file with the Clerk of such court an affidavit. . .". Although the Act does not make any such express requirement, defendant contends that if an affidavit is made by an agent, it must affirmatively appear from the affidavit itself that the affiant is acting as the agent of the creditor bringing the suit. The fallacy of defendant's argument as applied to the facts of this case, is that the person making the affidavit, that is, John Kassly, appears to be one of the creditors in the suit and as such, would clearly be entitled to make his own affidavit. In the affidavit the claim is made that the defendant is indebted to "plaintiff, Kassly Undertaking Company, and this affiant" (being John Kassly). In the complaint which was filed on April 16, 1941, two days prior to defendant's motion, John Kassly was named as plaintiff along with the Kassly Undertaking Company, and the claim was there made that the defendant was liable to both plaintiffs by reason of the breach of the alleged warranty in connection with the sale of the ambulance.

It appears from the evidence that at the time of the filing of suit, the Kassly Undertaking Company was a co-partnership consisting of John Kassly as the managing partner and certain members of his family as dormant partners. In this situation John Kassly, as the sole active partner in the partnership, would be entitled to sue without joining the dormant partners as party plaintiffs. (Lasher v. Colton, 225, Ill. 234) Although the defendant did not raise the question, the Kassly Undertaking Company, as a partnership, would have no legal capacity to bring suit in the partnership name, and John Kassly appears to be the only plaintiff in the suit with the legal capacity to sue. Whatever its other faults may have been, the affidavit in this case was not vulnerable to the particular objection made by defendant, and the trial court properly denied defendant's motion to dismiss

the suit and quash the writ.

After the denial of this motion, defendant filed a second motion to dismiss on the ground that the Kassly Undertaking Company was a co-partnership composed of John Kassly and certain other named members of his family, who it was alleged, should have been joined as parties plaintiff. This motion was also denied and defendant has assigned this as an additional error.

Under the rule laid down in Lasher v. Colton, supra, the dormant partners of the plaintiff John Kassly were not necessary parties plaintiff. Moreover, even assuming that the other partners were necessary parties and that they should have been joined as plaintiffs in the suit, Section 26 of the Civil Practice Act, Illinois Revised Statutes, Chapter 110, Paragraph 150 provides that "no action shall be defeated by non-joinder or misjoinder of parties." Because of this section, defendant was clearly not entitled to a dismissal of the suit.

After the denial of this motion, the cause was tried before a jury upon complaint and answer.

The only other alleged error argued by defendant is that, on the basis of the evidence introduced, the trial court improperly denied the defendant's motion for a directed verdict. By its answer the defendant expressly admitted that at the time of selling the ambulance, it promised and warranted that said ambulance was constructed of first-class material and workmanship and was in proper condition and fit to be used for ambulance service. No question has been raised as to the excessiveness of the judgment. The sole question presented is whether plaintiffs have shown a breach of the express warranty. The principal alleged defect was in the construction of the brakes of the ambulance, which plaintiffs claim were not large enough properly to brake the ambulance. The plaintiffs claim that the defective brakes were responsible for one accident in which the ambulance was involved, causing substantial damages, and that at least on fifteen different occasions the ambulance was laid up for repairs by reason of such defective brakes.

Defendant has filed a purported abstract of the testimony covering 130 printed pages. The testimony is set out practically in haec verba, even in the form of questions and answers, instead of being condensed in narrative form so as to present its substance clearly and concisely as provided by Rule 8 of this court. Under these circumstances we would be justified in refusing to consider any of the questions raised with reference to the sufficiency of the evidence, and in the absence of any other error, in affirming the judgment pro forma. Notwithstanding defendant's flagrant violation of the rule, we have considered the evidence and we are of the opinion that a prima facie case of liability was made, and that defendant was not entitled to a directed verdict.

We find no error in the judgment and it is accordingly affirmed.

AFFIRMED.

41819

HALLIE E. McCOWAN,

Plaintiff - Appellee,

v.

DON C. McCOWAN,

Defendant - Appellant.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY.

313 I.A. 654

131

MR. JUSTICE HEBEL DELIVERED THE OPINION OF THE COURT:

This is an appeal from an order entered in the Superior Court of Cook County on April 17, 1941. The plaintiff filed her complaint in December, 1938, for separate maintenance, after a marriage to defendant. Plaintiff's first motion in this separate maintenance suit was for temporary support and solicitor's fees, and was denied. Thereafter, defendant filed his counterclaim for divorce. While the actions were pending an order was entered on March 5, 1940 allowing the plaintiff temporary support money of \$20.00 per week and temporary solicitor's fees of \$1,500.00, and for an amount to be paid the special commissioner. Defendant appealed to this court from said order of March 5, 1940 in cause No. 41399, and a supersedeas bond in the sum of \$500 was filed by defendant on June 21, 1940. While this appeal was pending, the main issues came on before the trial court for hearing, and a final decree was entered on July 5, 1940, which decree dismissed the complaint and counter-complaint for want of equity. On October 2, 1940, while the former appeal, No. 41399, was pending, plaintiff procured an order for the allowance of \$500 to defend said appeal. On February 26, 1941, this court rendered its opinion in said former appeal, No. 41399, and thereby affirmed the allowance of temporary support and solicitor's fees as provided in the order of March 5, 1940, but reversed, modified and remanded the allowance for the special commissioner.

WILLIAM L. BROWN,
Plaintiff - Defendant,
v.
JOHN D. BROWN,
Defendant - Plaintiff.

WILLIAM L. BROWN,
Plaintiff - Defendant,
v.
JOHN D. BROWN,
Defendant - Plaintiff.

31818 A.A. 654

U.S. JUSTICE DEPARTMENT, DIVISION OF INVESTIGATION

This is an appeal from an order entered in the Superior Court of Cook County on April 17, 1941. The plaintiff filed her complaint in December, 1939, for separate maintenance, after a marriage to defendant. Plaintiff's first motion in said separate maintenance suit was for temporary support and solicitor's fees, and was denied. Thereafter, defendant filed his counterclaim for divorce. While the action was pending an order was entered on March 5, 1940 allowing the plaintiff temporary support money of \$20.00 per week and temporary solicitor's fees of \$1,000.00, and for an amount to be paid the special commissioner. Defendant appealed to this court from said order of March 5, 1940 in case No. 41390, and a supersedeas bond in the sum of \$500 was filed by defendant on June 17, 1940. While this appeal was pending, the main issues came on before the trial court for hearing, and a final decree was entered on July 5, 1940, which decree dissolved the complaint and counter-complaint for want of equity. On October 4, 1940, while the former appeal, No. 41390, was pending, plaintiff procured an order for the allowance of \$500 to defray said appeal. On February 23, 1941, this court rendered its opinion in said former appeal, No. 41390, and thereby affirmed the allowance of temporary support and solicitor's fees as provided in the order of March 5, 1940, but reversed, modified and remanded the allowance for the special commissioner.

On April 3, 1941, plaintiff filed her petition in the Superior Court, praying for an additional allowance of \$500 for attorney's fees for having defended said appeal. By court order of April 3, 1941, leave was given the plaintiff to file her said petition, and defendant was given leave to file his written answer to said petition. On April 17, 1941, the court entered an order which provided; (1) for the entry of a judgment upon the order of May 5, 1940 in the sum of \$1,930, (2) for an order upon the surety company to turn over the \$500 specified in the appeal bond, (3) for the reduction of the special commissioner's fees to \$56, and (4) for the payment by defendant to the plaintiff of an additional \$500 for attorney's fees and costs expended by plaintiff in defending Appeal No. 41399. It is from this order that defendant appeals. The order appealed from, entered on April 17, 1941, is predicated upon plaintiff's petition of April 3, 1941, and that petition is the only pleading essentially involved in this appeal.

The defendant contends that the final decree of July 5, 1940, which dismissed the main issues for want of equity, left the court without jurisdiction on April 17, 1941, to render judgment for the plaintiff and against defendant for \$1,930 which amount represented the former allowance of temporary support money and temporary solicitor's fees, and further suggests that the final decree of July 5, 1940, made the former allowance of temporary support money and solicitor's fees unenforcible, and left the parties as husband and wife, and therefore, neither party could maintain further litigation against the other, except as provided by statute. While it is true that the final decree of July 5, 1940, which dismissed for want of equity the plaintiff's complaint and defendant's cross complaint for divorce, left the parties to this action in the status of man and wife, it does appear from this decree that the court reserved jurisdiction as to the temporary allowance of support money and solicitor's fees. The decree provided;

On April 3, 1941, Plaintiff filed her petition in the
Superior Court, praying for an additional allowance of \$100 per
attorney's fees for having defended said appeal. By court order of
April 3, 1941, leave was given the Plaintiff to file her said petition,
and defendant was given leave to file his written answer to said
petition. On April 17, 1941, the court entered an order which
provided: (1) for the entry of a judgment upon the order of May 6,
1940 in the sum of \$1,000, (2) for an order upon the entry whereby
to turn over the \$300 specified in the second count, (3) for the
restitution of the special constable's fees as \$25, and (4) for
the payment by defendant to the Plaintiff of an additional \$100
for attorney's fees and costs expended by Plaintiff in defending
Appel No. 4192. It is from this order that defendant appeals.
The order appealed from, entered on April 17, 1941, is predicated upon
Plaintiff's petition of April 3, 1941, and such action is the only
pleading essentially involved in this appeal.

The defendant contends that the final decree of July 6,
1940, which dissolved the said issues for want of unity, left the
court without jurisdiction on April 17, 1941, to render judgment for
the Plaintiff and against defendant for \$1,000 which amount represented
the former allowance of temporary alimony money and temporary solicitor's
fees, and further suggests that the final decree of July 6, 1940, voids
the former allowance of temporary alimony money and solicitor's fees
whenever made, and left the parties as husband and wife, and therefore,
no other entry could be made in further litigation against the court,
except as provided by statute. While it is true that the final decree
of July 6, 1940, which dissolved for want of unity the Plaintiff's
complaint and defendant's cross complaint for divorce, left the parties
to this action in the status of man and wife, it does appear from
this decree that the court reserved jurisdiction as to the temporary
allowance of alimony money and solicitor's fees. The parties provided;

"It is hereby ordered, adjudged and decreed that the complaint of the plaintiff and the counter-claim of the defendant herein be, and the same are hereby dismissed for want of equity, and the entire cause dismissed save and except for the matters contained in and relative to the order of this Court entered on March 5, 1940 by Judge John C. Lowe, and pertaining to the question of alimony pendente lite, temporary solicitor's fees and Special Commissioner's report which are hereby transferred to said Judge for his action, if any."

The defendant, however, suggests that this judgment order was erroneous for two reasons; first, the dismissal of the main issues for want of equity made the temporary orders unenforceable, and second, the order of the judgment in favor of a wife and against her husband is contrary to the well established law, and cites the opinion of the Supreme Court in Chestnut v. Chestnut, 77 Ill. 346. It appears in that case that the court entered a judgment on an award for temporary support money after the dismissal of the complaint for divorce. The Court, upon the question of the authority of the court to enter such an order, said;

"But aside from this view, upon principle, it would appear that the dismissing of the bill would operate to revoke the order allowing temporary alimony. Such a provision is for her immediate support, and to enable her to meet the expenses of her defense pending the litigation. When the bill was dismissed, the husband's common law liability to support his wife was revived, and the necessity for alimony did not exist. It will be presumed he discharged his obligation in that regard, and at all events the liability remained, and it would be oppressive to impose upon him the payment of an additional sum deemed sufficient to support her if living separate and apart from him."

In citing authorities upon like questions, the defendant suggests that it was improper to reduce to judgment the amounts accrued under the order of March 5, 1940, which provided for temporary support money and solicitor's fees, as the order for judgment of April 17, 1941, was entered subsequent to the decree of July 5, 1940. As herein stated, on April 17, 1941, the parties hereto were and still are husband and wife. Defendant urges that it was, therefore, error to enter a judgment in favor of the wife and against her husband, and contends that only where the statutes of our State

1. It is hereby ordered, adjourned and do hereby give the
 2. Plaintiff of the Plaintiff and the counter-claim of the defendant
 3. Plaintiff, and the same are hereby dismissed for want of equity,
 4. and the entire same are dismissed and except for the balance on
 5. contained in and relative to the order of this Court entered on
 6. March 1, 1940, by Judge John C. Lane, and pertaining to the question
 7. of attorney's fees and disbursements, which fees and disbursements
 8. are hereby remanded to said Judge
 9. for his action. It is so.

The defendant, however, suggests that this judgment order was erroneous for two reasons; first, the dismissal of the main issue for want of equity made the judgment order unenforceable, and second, the order of the judgment in favor of a wife was unlawful. The defendant is contrary to the said assignment law, and other the opinion of the Supreme Court in Shelton v. Shelton, 27 Cal. 460. It appears in this case that the court entered a judgment in an order for temporary support money which the dismissal of the complaint for divorce, for want of equity, was the question of the validity of the order to which no objection was made.

[illegible]

is cited authorities upon the question, the defendant admits that it was improper to refuse to judgment the account against under the order of March 2, 1940, which provided for payment of money to the defendant's wife, as the order for judgment of April 17, 1941, was entered subsequent to the date of July 1, 1940, as herein stated, on April 17, 1941, the parties were not in default and the defendant was not in default and the court is entered in favor of the wife and against the husband, and concludes that the wife is entitled to the same.

provide for litigation between husband and wife, can the same be carried on, and cite Chap. 68, Ill. Rev. Stat. 1939. It is urged that if pending divorce or separate maintenance actions have been abated, so that the parties are man and wife, no litigation can be carried on between them, as they are one in the eyes of the law.

The plaintiff, however, in answering the defendant's theory, contends that the entry of judgment on April 17, 1941, upon the order previously entered on March 5, 1940 for support money and temporary solicitor's fees was proper, and calls attention to the fact that the order entered on March 5, 1940 was affirmed by this court in McGowan v. McGowan, 308 Ill. App. 669. From this suggestion it appears that the time for filing a petition for rehearing has long since elapsed, yet defendant now urges the same arguments and theories as in the previous appeal. It appears from what was said by this court on the previous appeal that "having considered the facts and evidence and the law, the order of March 5, 1940 is affirmed as to the allowance of temporary alimony and solicitor's fees"; and, therefore, so far as the question of the validity of the order of March 5, 1940 is concerned, it is res adjudicata.

The question here is whether the trial court had the jurisdiction to make an allowance to the plaintiff for solicitor's fees and costs to defend an appeal by the defendant. It is provided in Chap. 40, sec. 16, Ill. Rev. Stat. 1939, that;

" * * * In case of appeal by the husband or wife, the Court in which the decree or order is rendered may grant and enforce the payment of such money for her or his defense and such equitable alimony during the pendency of the appeal as to such court shall seem reasonable and proper * * *"

It does not appear that there is any question here of alimony pending appeal, the only controversy being the allowance of attorney's fees. The defendant insists that it was error for the court to enter the order for additional attorney's fees because the petition was not verified and no evidence was taken prior to its entry. It would appear that the allowance of additional attorney's fees and costs for defending

that appeal is governed by the above section of the statute, and that there is there no requirement that application for such allowance be made by verified petition, nor that evidence be taken as a prerequisite for such allowance. The statute states that such allowance shall be made, "as to the Court shall seem reasonable and proper". The defendant's answer to plaintiff's petition for an additional allowance does not raise the objection that evidence should have been taken prior to the entry of any such order nor that the petition is not verified, and plaintiff urges that, since these contentions are now urged for the first time on this appeal, they should not be considered by this court. There is no suggestion by the defendant that the allowance of the additional amount is excessive. In the previous appeal, McCowan v. McCowan, 308 Ill. App. 669, the court found that hearings had been held before a Special Commissioner in conformity with the statute, "to take and report evidence with reference to the conditions in life of the parties and their circumstances * * *" and that such a report had been filed. The trial court had knowledge of the status of the parties and that the defendant was worth approximately \$30,000.00 with an annual income of \$10,000.00. If such status had changed the defendant should have so stated in his answer to the petition. The allowance being proper, therefore, as to amount, we are of opinion that there is no basis for defendant's objection that evidence was not taken prior to the entry of the order.

The defendant wishes the court to note that the order of October 2, 1940, calls for the payment of the sum of \$500 on the date of its entry, and further that if the amount is paid under the terms of the order it shall be allowed as a credit to the defendant. The defendant insists that this order is res adjudicata as to any further allowance for defending that appeal. It does not appear, however, that defendant has paid anything under said order, (nor that he has complied with any order entered upon him by the trial court or this court.) The record in this court is silent as to

that no trial is governed up the entire history of the evidence, but that there is there no requirement that a defendant for whom an alibi is made by verified testimony, nor that evidence be given as a circumstance for such alibi. The evidence states that such alibi shall be made, "as to the facts shall have been established and proper." The defendant's answer to plaintiff's motion for an additional alibi does not raise the objection that evidence should have been taken prior to the entry of any such motion and that the motion is not verified, and plaintiff agrees that, since there is no objection to the first trial to this motion, any objection should not be considered by this court. There is no objection by the defendant that the alibi of the defendant should be considered. In the previous record, McGowan v. McGowan, 100 Ill. App. 2d, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

defendant paying any money, nor does he advance the theory that he has made payments which should be credited to him in reaching the amount due. The plaintiff urges that the defendant having failed to comply with the order of October 2, 1940, he cannot be heard to insist upon whatever benefit it might have afforded him had he so complied. We are of the opinion that there is sufficient in the record to justify the court in allowing an additional \$500 under the above quoted statute for defense of the appeal.

On the question of whether, after the dismissal of the complaint and counterclaim of the parties, the court was in a position to enter a judgment for the full amount that was due from defendant as temporary alimony and solicitor's fees, the case of In Re Est. of Ball, 210 Ill. App. 350, is cited. There the court said upon questions of like character;

"The order to pay alimony was a judgment of the court. After judgment it became a vested right which could not be divested by a subsequent order of the court. The affirmance of that judgment on appeal made it final. Gordon v. Baker, 182 Ill. App. 587; Cole v. Cole, 142 Ill. 19; Craig v. Craig, 163 Ill. 176.

"While the death of the husband abated the suit, nevertheless the amount due to the time of such death is recoverable by the widow and is properly a debt provable against decedent's estate. Dinet v. Eizenmann, 80 Ill. 274, is, we think authority for this holding. In that case, where the wife had died, the alimony decree was enforced against the husband for the amount unpaid under the decree at the time of her death. We think the converse of this proposition, presented in this case, is by parity of reasoning likewise maintainable. As said in Knapp v. Knapp, 134 Mass. 353: 'If a writ of scire facias can be brought against the husband to obtain an execution against him for alimony, which, by a decree of the court, he has been ordered to pay, there is no good reason why the same process should not be used to enforce such a decree by obtaining execution against his estate for arrears of alimony due at the time of his death'."

In the instant case, plaintiff filed her petition on April 3, 1941 for the entry of a judgment upon the order previously entered for support money and temporary solicitor's fees, and on April 17, 1941 judgment was entered for the full amount due and unpaid by the defendant under said previous order, and execution ordered to issue therefor. After considering the questions involved, we believe the judgment order to be proper.

There is a question called to our attention by the defendant regarding the court's order that the Hartford Accident & Indemnity Company pay over to plaintiff the \$500 specified in the appeal bond, contending that the respective rights of the principal and surety named in the bond could only be determined in an action on the bond. The amount was paid by the surety company in open court and credit given to defendant for that amount, and we do not think the objection of defendant well taken.

For the reasons stated the judgment order of April 17, 1941, entered upon plaintiff's petition, is affirmed.

JUDGMENT ORDER AFFIRMED.

BURKE, P.J. AND KILEY, J. CONCUR.

There is a question raised in the attention of the
defendant regarding the court's order that the defendant furnish a
bond, and the defendant says that the bond is not required in the
usual bond, containing that the responsible party of the plaintiff
and surety named in the bond could only be released in an action
on the bond. The amount was paid by the surety company in open
court and credit given to defendant for that amount, and we do not
think the objection of defendant will be taken.

For the reasons stated the judgment order of April 17,
1911, entered upon plaintiff's petition, is affirmed.
COURT REPORTER, CHICAGO.

WILLIAM L. L. AND KILLY, J. CHICAGO.

41681

BETTY LOIS SMITH,

Plaintiff - Appellee,

v.

FERDINAND J. KARASEK, WILLIAM AWE
AND OSCAR M. MEUSEL,

Defendants - Appellants.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

313 I.A. 654²

MR. JUSTICE KILEY DELIVERED THE OPINION OF THE COURT.

This is an appeal from a summary judgment for \$329.00 against the defendants in an action upon a note in the Municipal Court of Chicago. The defendant Awe did not join in the appeal.

Plaintiff confessed judgment in the trial court on January 17, 1940 for \$405.03. The note upon which judgment was confessed was made June 7, 1938 in the amount of \$700.00, payable January 2, 1939, to plaintiff's order with interest at six per cent per annum and is signed by the three defendants. On April 19, 1940, the defendants Karasek and Meusel, attorneys, filed a sworn petition to set aside and vacate the judgment, and on July 9, 1940, by leave of court, filed a sworn amendment to said petition. July 12, 1940, the trial court gave leave to these defendants to appear and defend, with the judgment to stand as security, and ordered the plaintiff to answer defendants' pleadings which were ordered to stand as their affidavits of merits. July 22, plaintiff replied and on September 19, 1940, on motion of plaintiff summary judgment was entered for her in the sum of \$329.00.

The defendants to reverse the judgment contend that the note is expressly and impliedly admitted to be usurious as to part of the principal and interest and that the note, therefore, is void and uncollectible; and that plaintiff's motion for summary judgment should have been denied, since her attorney, and not plaintiff, made the affidavits in her pleadings and since triable

DEPT. OF JUSTICE

Plaintiff - Defendant

v.

EDWARD J. KANE, et al.
AND OTHERS

Defendants - Plaintiff

3131.A.664

IN SENATE

This is an appeal from a summary judgment for \$100,000 against the defendants in an action upon a note in the United States Court of Chicago. The defendant has not been joined in the appeal. Plaintiff contends judgment in the trial court on

January 17, 1940 for \$100,000. The note upon which judgment was entered was made June 7, 1935 in the amount of \$100,000, payable January 2, 1940, to plaintiff's order and interest at six per

cent per annum and is signed by the three defendants. On April 12, 1940, the defendant KANE and KANE, et al., filed a

motion to set aside and vacate the judgment, and on July 1, 1940, by leave of court, filed a sworn statement in support of said motion.

July 11, 1940, the trial court gave leave to these defendants to answer and defend, with the judgment to stand as security, and

ordered the plaintiff to answer defendants' affidavits which were ordered to stand as their affidavit of denial. July 11, plaintiff

tried and on September 10, 1940, an action of plaintiff's summary judgment was entered for her in the sum of \$100,000.

The defendant in reply states the judgment against her is not in conformity and is invalidly obtained in the manner as he says

of the principal and interest and that the note, therefore, is void and uncollectible; and that plaintiff's action for recovery

judgment should have been denied, since her account, and not plaintiff, made the advance in her plaintiff's name and

issues of fact were presented by the several pleadings. The plaintiff denies usury in the principal but admits usury of the interest and contends that by having the judgment reduced by the amount of the usury, the defect was cured and the principal amount not affected; that plaintiff's sworn pleadings were proper affidavits for summary judgment; and that because no triable issues were presented by the pleading, the court properly entered judgment for plaintiff.

Plaintiff seeks in this court, attorney's fees in the sum of \$42.20, and ten percent damages under Section 23 of the Costs Act because she says the defendants have admitted the indebtedness. The question of the attorney's fees was not presented to the trial court and is not before us; and we cannot find from the record before us that this appeal is prosecuted for delay, consequently, we need not consider whether the section of the Costs Act cited is applicable.

We shall consider first the technical objections to the summary judgment. The defendants contend that the notice of plaintiff's motion, pursuant to which summary judgment was given in the trial court, did not include notice of a motion for said judgment and that no such motion was made; and that plaintiff's pleadings were not sworn to by plaintiff as required by section 72 of the Civil Practice Rules of the Municipal Court. It is true that notice of plaintiff's motion did not cover a motion for summary judgment, but the defendants were in court in response to the notice, had been permitted to and did file an original and amended affidavit of defense, and we can find no prejudice suffered by them. While the record does not show a written motion by plaintiff for summary judgment, the court, nevertheless, had before it the several sworn pleadings of the parties and the parties themselves, the record indicates the motion was made and we find no error on the part of the court in entertaining such motion. These defendants, who are attorneys, made no motion in the trial court to strike plaintiff's pleading for want of proper affidavit and, consequently, the point cannot be urged here.

... of fact were presented by the several witnesses. The plaintiff
Genie Henry in the original but admits that of the interest and
contains that by having the judgment reduced by the amount of the
money, the defect was cured and the original amount not withdrawn;
that plaintiff's sworn statements were proper evidence for the court
judgment; and that because no other facts were presented by the
defendant, the court properly entered judgment for plaintiff.
Plaintiff came in this court, without any other evidence in the case
of \$42.50, and the court entered judgment for the plaintiff in the
sum of \$42.50 and costs. The defendant has admitted the judgment. The
question of the plaintiff's facts was not presented to the trial court
and is not before us; and we cannot find from the record before us
that this money is procured for sale, consequently, we need not
consider whether the action of the court is correct or not.
We shall now consider first the technical objections to the
summons judgment. The defendant contends that the action is illegal
and is not a proper judgment to which summary judgment was given in the
trial court, and that the action is not a proper judgment and
that no such action was made; and that plaintiff's judgment was not
made to by plaintiff as required by section 72 of the Civil Practice
Act of the principal court. It is true that section 72 of plaintiff's
action did not cover a motion for summary judgment, but the defendant
was in court in response to the motion, and then admitted to the fact
that the original and amended affidavits of defendant, and the fact that
plaintiff withdrew its case, which the court found not to be a proper
motion by plaintiff for summary judgment, the court, nevertheless,
had before it the several sworn findings of the parties and the
written statements, the record indicates the motion was made and the
fact no error on the part of the court in withdrawing such motion.
These statements, and the statements, were no motion in the trial
court to withdraw plaintiff's judgment for want of proper affidavits
and, consequently, the court cannot be reversed.

Both parties agree that the law of this State does not permit a summary judgment where triable issues of fact appear from the pleadings. The test is in the facts alleged in defendants' affidavit of merits and plaintiff's sworn reply.

The defendants' material allegations admitted by plaintiff's reply are that though the note is for \$700.00, the original judgment was for \$405.03, including principal and interest and attorney's fees; that there is no notation on said note of an interest payment of \$21.00 made to plaintiff January 24, 1939 by the defendant Awe; that the note shows no payment of principal and the judgment confessed is less than the face amount of the note. Plaintiff further admits that the interest payment of \$21.00 made by Awe was usurious; that the loan was a transaction exclusively between the plaintiff and Awe; that the \$21.00 interest payment was on the sum of \$350.00 which was the amount of the loan, and that the balance of the face value of the note represented a bonus which Awe promised to pay the plaintiff, but upon which no interest was to be paid. Plaintiff's reply denies the allegations of the defendants that the note is a usurious contract, tainted with usury; that the usurious part and the lawful part are inseparable and the entire note unenforceable; that the actual amount of the loan was not disclosed to the defendants; that though the note was prepared by the defendant Meusel and presented to Karasek, the latter was wholly unaware of the amount loaned and unaware of the secret agreement between plaintiff and Awe as to the face amount of the note and the actual amount of the loan; that neither is indebted to plaintiff and no demand was made on them for payment; that plaintiff in a letter of July 26, 1939, admitted that the note was usurious and tainted with fraud and that she would divide the \$350.00 with these defendants should a judgment for \$700 be confessed against Awe; that it is evident from the pleadings of

Both parties agree that the law of this State does not permit a summary judgment where there is issue of fact between two parties. The fact is in issue raised in defendant's affidavit of merits and plaintiff's sworn reply.

The defendant's material allegations admitted by plaintiff's reply are that though the note is for \$200.00, the original judgment was for \$408.00, including attorney's fees and attorney's fees; that there is no question on this note of an interest payment of \$11.00 made to plaintiff January 1, 1939 by the defendant; that the note shows no payment of principal and the judgment entered is less than the face amount of the note.

Plaintiff further admits that the interest payment of \$11.00 made by her was made; that the loan was a transaction exclusively between the plaintiff and her; that the \$11.00 interest payment was on the sum of \$200.00 which was the amount of the loan, and that the balance of the face value of the note represented a bonus which she offered to pay the plaintiff, but with which no interest was to be paid. Plaintiff's reply denies the allegations of the defendant that the note is a usurious contract, entered with usury; that the usurious part and the lawful part are inseparable and the entire note unenforceable; that the actual amount of the loan was not advanced to the defendant; that though the note was presented by the defendant to the defendant and presented to the bank, the latter was wholly unaware of the amount loaned and amount of the interest payment between plaintiff and her as to the face amount of the note and the actual amount of the loan; that plaintiff is indebted to plaintiff and no account was made on their last payment.

Plaintiff in a letter of July 22, 1939, admitted that the note was usurious and entered with fraud and that she would divide the \$200.00 with those defendants should a judgment for \$200.00 be returned against her; that it is evident from the findings of

these defendants, that (a) plaintiff is not a holder for value; (b) that she falsely represented the amount of the loan; (c) that she fraudulently induced these defendants to sign a note for \$700.00, each one of these defendants believing the loan was for \$700.00 instead of \$350.00, that they did not know the note was usurious, that if they knew the note was for \$350.00 instead of \$700.00, they would not have signed; that she made false representations knowing them to be false and material, that such representations were relied upon by these defendants who acted thereon to their damage; (d) that the note is unlawful, usurious, etc., and (e) that knowing the note is unlawful and usurious, she still persists in collecting and enforcing the note; that these defendants have a complete defense.

Valid inferences from the facts well pleaded by the defendants are that while they complain in general terms of usury, their detailed allegation limits the charge of usury to the interest payment of \$21.00; that though they claimed fraud was practiced upon them because the loan was for only \$350.00 and the note for \$700.00, no fraud appears from the facts alleged and the record discloses that only \$350.00 principal was sought and recovered by plaintiff in her original judgment and in the summary judgment she accepted a reduction in the amount of the admittedly usurious interest; that while these defendants claim the note was without consideration, they admit its validity by not denying plaintiff's charges that they confessed their liability upon the note in a letter to the plaintiff, as will appear hereinafter.

Plaintiff's reply set out as new matter, that she received a letter from these defendants June 21, 1938, which advised her that they joined with Awe in signing the note as signers and not only as sureties and that they, therefore, had become primarily and not secondarily liable, and that if the note was not paid she

these defendants, that (a) if liability is not a matter for trial;
(b) that the California representative was aware of the loan; (c)
that the financial institution intended to sign a note
for \$700.00, even though the defendant believed the loan was
for \$700.00 instead of \$250.00, that they did not know the note was
untrue, that if they knew the note was for \$250.00 instead of
\$700.00, they would not have signed; that the note was filed for record
along knowing that it was not correct, that such representation
were relied upon by these defendants who acted thereon to their
damage; (d) that the note is unlawful, voidable, and null and void
that knowing the note is unlawful and voidable, and null and void
in collecting and enforcing the note; that these defendants have
a common defense.

Valle's testimony from the note well pleaded by the
defendants and that Valle they contain in general terms of money,
their detailed allegation that the money is the interest
payment of \$11.00; that though they stated that was provided
upon then because the loan was for only \$250.00 and the note for
\$700.00, no record exists from the bank signed and the record
discloses that only \$250.00 principal was received and recovered by
plaintiff in her original judgment and in the summary judgment she
accepted a variation in the amount of the plaintiff's demand
interest; that while these defendants claim the note was without
consideration, they admit the validity of the "writing of liability";
charges that they confessed their liability upon the note in a
letter to the plaintiff, as will appear hereafter.

Plaintiff's reply set out as new matter, that she received
a letter from these defendants June 11, 1935, which advised her
that they joined with her in signing the note as guarantors and that
only as guarantors and that they, defendants, did know exactly
and not secondarily liable, and that if the note was not with the

could confess judgment against them and obtain a lien upon all their property and possessions and that those statements constituted her security. The reply further alleges that she gave \$350.00 in United States dollar bills as consideration for the note. The new matter was not met by any additional pleading of the defendants and is, therefore, admitted. This new matter overcomes the allegations in defendants' pleading that there was no consideration.

The defendants contend that because of the usurious interest, and the fact that the note on its face is for \$700.00 whereas the actual consideration therefor was but \$350.00, the entire note is illegal, in violation of the Interest Act (Chap. 74, Ill. Rev. Stats. 1941), and unenforceable. They argue that part of the principal, \$350.00 over and above the actual loan, is usurious and not separable from the amount of the loan and that under the law in Illinois, the entire contract must fail. We disagree with defendants' contentions. There are no facts well pleaded from which an inference of usury in the principal can be drawn. The plaintiff admits loaning only \$350.00 and she confessed judgment for that amount. The note is not in violation of the Interest Act, but the admittedly usurious interest is, and plaintiff, having accepted \$21.00 in usurious interest, must thereby, under section 8 of that Act, forfeit all interest due on the note. She is entitled to recover the principal, however, under that section and under the uniform rule in the Illinois cases. We have read the cases cited by the defendants in support of their contention. All but one of the cases are inapplicable to the facts here because in them the subject-matter of the principal contract was illegal. The case of Armour v. Moore, 5 Ill. App. 433, cited by plaintiff is applicable here, but the principles announced there support our ruling on this point and do not support defendants' contentions. We conclude,

could possibly judgment against them and should a lien upon all their property and possessions, as the Illinois Constitution provides, be security. The only further thing that the note says is that the state dollar bill is consideration for the note. The note says, "and not by any additional charging of the defendant and is, therefore, admitted. This new matter overcomes the allegation in defendant's pleading that there was no consideration."

The defendant contends that because of the previous interest, and the fact that the note on its face is for \$100.00, whereas the actual consideration therefor was but \$50.00, the entire note is illegal, in violation of the interest act (Chap. 94, Ill. Rev. Stat. 1941), and unenforceable. They argue that each of the principal, \$50.00, over and above the actual loan, is recoverable and not repayable from the amount of the loan and that under the law in Illinois, the entire contract must fail. We disagree with defendant's contention. There are no facts well pleaded from which an inference of fraud in the principal can be drawn. The plaintiff admits loaning only \$50.00 and the contract is enforceable for that amount. The note is not in violation of the interest act, but the allegedly excessive interest is, and plaintiff, having accepted \$100 in principal interest, must pay it, under section 2 of that act, for it is interest due on the note. But is plaintiff to recover the principal, however, under that section and under the uniform rule in the Illinois cases, as both read and cases cited by the defendant in support of their contention. All but one of the cases are inapplicable to the facts here because in that case the subject-matter of the principal contract was illegal. The case of Stacy v. Stacy, 3 Ill. App. 420, cited by plaintiff is applicable here, but the principal contract there was not void as to the debt and so not enforceable, contrary to plaintiff's contention.

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therefore, that there are no facts pleaded by these defendants from which a reasonable inference can be drawn that the note, subject of this suit, is void for usury.

We hold that no triable issues of fact were presented by the affidavit of these defendants and that no defense to plaintiff's action appeared from these pleadings and, consequently, the trial court properly entered the summary judgment for plaintiff. That judgment is hereby affirmed.

JUDGMENT AFFIRMED.

BURKE, P.J. AND HEBEL, J. CONCUR.

Therefore, that there are no facts which are
true which a reasonable inference can be drawn from the facts, and
of this suit, is void for want of.

It holds that no title passes of land when presented

by the affidavit of those defendants and that no defense is
available to them against the title of the plaintiff.
The title of the plaintiff is not subject to the title of the
defendant in this case.

PLAINT FOR TITLE.

THE STATE OF TEXAS, ss. I, J. M. BERRY, a Justice of the Peace for the County of _____, do hereby certify that the within and foregoing is a true and correct copy of the original of the same as the same appears from the records of the County Clerk of said County.

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